110

Supreme Court, U.S.
FILED

OCT 28 2008

OFFICE OF THE CLERK

No. 08-568

In The
Supreme Court of the United States

JAY HOWARD ROTHHAUPT,
Petitioner,

v.

RON WAYNE DICKOW, Individually and in his official capacity as Deputy Carroll County Sheriff,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

GARRY R. ADAMS, JR.
Counsel of Record
CLAY & ADAMS, PLLC
MEIDINGER TOWER, SUITE 1730
462 S. FOURTH AVENUE
LOUISVILLE, KY 40202
(502) 561-2005

Counsel for Petitioner

October 28, 2008

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Whether the Sixth Circuit's Opinion is in conflict with this Court's holding and the decisions in other Circuits which would allow the introduction of state law to prove the interference with a constitutional right.

PARTIES TO THE PROCEEDING

Jay Rothhaupt is the Petitioner. The Respondent is Ron Dickow, Deputy, Carroll County Sheriff's Office.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION ... 8

I. The Court Should Have Allowed the Petitioner to Introduce Evidence of Kentucky Law to show the Deputy Lacked Probable Cause. 9

II. The Instructions Must Conform to the Facts 13

III. The Instructions Were Prejudicial 14

VI. CONCLUSION 17

APPENDIX

Appendix A: Sixth Circuit Order, dated July 30, 2008 ..... 1a

Appendix B: District Court Judgment in a Civil Case, dated March 20, 2007 ..... 12a

Appendix C: District Court Vertict Form, dated March 20, 2007 ..... 14a

Appendix D: Sixth Circuit Opinion, dated July 20, 2005 ..... 16a

TABLE OF AUTHORITIES

CASES

Boykin v. Van Buren Township,
479 F.3d 444 (6th Cir. 2007) 15, 16, 17

Carroll v. United States,
267 U.S. 132 (1925) 11

Estate of Dietrich v. Burrows,
167 F.3d 1007 (6th Cir. 1999) 11

Gardenshire v. Schubert,
205 F.3d 303 (6th Cir. 2000) 11

Gerstein v. Pugh,
420 U.S. 103, 95 S.Ct. 854,
43 L.Ed.2d 54 (1975) 10

Illinois v. Gates,
462 U.S. 213 (1983) 16

Michigan v. DeFillippo,
443 U.S. 31, 99 S.Ct. 2627,
61 L.Ed.2d 343 (1979) 10, 13

Painter v. Robertson,
185 F.3d 557 (6th Cir. 1999) 11

Pyles v. Raisor,
60 F.3d 1211 (6th Cir. 1995) 9, 11, 12, 17

Radvansky v. City of Olmstead Falls,
395 F.3d 291 (6th Cir. 2005) 15

Thomas v. Cohen,
304 F3d 563 (6th Cir. 2002) 12, 13

CONSTITUTIONAL PROVISIONS

U.S. Const. amend IV 2

STATUTES

28 U.S.C. § 1254(1) 1

42 U.S.C. ¶ 1983 2

KRS 431.005 ..... 10, 12

RULES

Sup. Ct. R. 10 1

OPINIONS BELOW

The order of the United States Court of Appeals for the Sixth Circuit reversing and remanding the judgment of the United States District Court for the Eastern District of Kentucky (No. 04-5868) on the Plaintiff's claim of unlawful arrest.

The order of the United States Court of Appeals for the Sixth Circuit that affirmed the judgment of the United States District Court for the Eastern District of Kentucky (Nos. 07-5425 & 07-5541). The Opinion of the Sixth Circuit is not recommended for full text publication.

JURISDICTION

The final judgment of the district court was entered on March 20, 2007. A timely notice of appeal to the United States Court of Appeals for the Sixth Circuit was filed on April 9, 2007. The judgment of the Sixth Circuit was entered on July 30, 2008. Jurisdiction is proper over this writ pursuant to 28 U.S.C. § 1254(1) because it is an appeal from a final decision of the United States Court of Appeals and is filed within 90 days of the Court of Appeals entry of Order.

This petition is filed under this Court's Rule 10 seeking discretionary review of the Sixth Circuit's Opinion which conflicts with other Circuits and denies individuals freedom against unreasonable searches and seizures.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourth Amendment to the Constitution of the United States guarantees "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures." U.S. CONST. amend. IV.

42 U.S.C. ¶ 1983 provides: "Every person who, under color of any statute...subjects or causes to be subjected any citizen.... To the deprivation of any rights, privileges, or immunities secured by the Constitution and the laws, shall be liable to the party injured in an action at law..."

STATEMENT OF THE CASE

Petitioner was employed at Overlook Systems Technologies, Inc. as a staff engineer, working on projects for Lockheed Martin with top-secret security clearance. (R.21, Rothhaupt deposition, pp. 14-20, JA pp. 103-09)[1]. Petitioner is a trained aeronautical and astronautical engineer who received his education from Penn State and the Airforce Institute of Technology and subsequently taught at the Air Force Academy. (See Plaintiff's resume, attached to Complaint, R.1, Complaint, p. 11, JA p. 17). Petitioner is also a collector, as a hobby. As part of his hobby, he participates in auctions on eBay, an online auction website. (R.21, Rothhaupt deposition, p. 57, JA p. 110).

---

[1] "JA" page references are to the Joint Appendix filed in this case at the Sixth Circuit.

On or about July 14, 2001, Petitioner was the winning bidder on eBay of four Pfaltzgraff Tumblers, with a bid of $59.00 plus shipping charges of $7.70 from Seldon and Phyllis Scott, doing business as Hilltop Collectibles (named as Defendants in the original Complaint.) (R.21, Rothhaupt deposition, p. 58, JA p. 111). (The Scotts are not parties to this appeal.)

When Petitioner received the tumblers, he examined the product and realized the tumblers did not conform to the auction description. In fact, the tumblers contained several flaws. Petitioner then contacted the Scotts by email to outline, with specificity, the flaws in the tumblers and his unhappiness with the items. Petitioner exchanged several e-mails with the Scotts in an attempt to resolve the dispute. Ultimately, the Scotts cut off communication with Petitioner and left the issue unresolved.

Prior to the incident which resulted in this lawsuit, Petitioner was visiting his mother in Pennsylvania for a family reunion. In addition he would be able to get some target practice for an upcoming elk hunt. (R.21, Rothhaupt deposition pp. 107-09, JA pp. 111-13). As he was traveling back to Colorado, on or about September 21, 2002, Petitioner drove through Kentucky in order to hand-deliver the goods in question back to the Scotts. (R.21, Rothhaupt deposition pp. 108-09, JA pp. 112-13).

Before going to the Scotts' residence, Petitioner telephoned and informed them he had a package for them. Mrs. Scott answered the phone and did not ask Petitioner to identify himself. (R.21, Rothhaupt

deposition p. 116, JA p. 114). Petitioner headed toward the Scotts' residence for the sole purpose of returning the tumblers. (R.21, Rothhaupt deposition p. 117, JA p. 115).

At the Scotts' residence, Petitioner took the tumblers to the door and requested the sum of $100 in return. (R.21, Rothhaupt deposition p. 121, JA p. 116). After Mr. Scott stated his refusal to pay for the goods, he became angry and demanded to know who Petitioner "was with." The Petitioner verbalized Jay Rothhaupt. (R.21, Rothhaupt deposition pp. 121-122, JA pp. 116-17). Mr. Scott identified himself as a law enforcement officer and told Petitioner to, "stay right there." In the District Court Criminal trial, Seldon Scott admitted he told the Petitioner that he was a law enforcement officer. (Transcript Jury Trial p. 44). Mr. Scott then informed Petitioner he was refusing shipment, and had Mrs. Scott "call the police." Petitioner confirmed that Scott was refusing the package and left the residence. Petitioner was never asked to leave the residence by either Seldon or Phyllis Scott. (R.21, Rothhaupt deposition p. 124, JA p. 118). As Petitioner was leaving the residence, Seldon Scott followed him reciting Petitioner's license plate number. Scott then turned around and went back inside his house. (R.21, Rothhaupt deposition p. 127, JA p. 119).

Petitioner then attempted to continue on his trip back to Colorado. (R.21, Rothhaupt deposition p. 130, JA p. 120). While driving away, Petitioner noticed Scott was following him. (R.21, Rothhaupt deposition p. 133, JA p. 121). After driving for six miles on Highway 71, Petitioner was pulled over by Deputy Dickow. Scott pulled in immediately behind them

after the stop. (R.21, Rothhaupt deposition pp. 135-36, JA pp. 122-23). Deputy Dickow requested to see Petitioner's driver's license and asked about Petitioner's travel plans. (R.21, Rothhaupt deposition pp. 138-39, JA pp. 124-25). Deputy Dickow informed Petitioner he was responding to a trespassing complaint. Scott stated he had told Petitioner to leave his property in front of Dickow and Rothhaupt. (R.21, Rothhaupt deposition p. 141, JA p. 127), Rothhaupt refuted that allegation, and informed Dickow in front of Scott that Scott had actually told Petitioner to "stay right there." (R.21, Rothhaupt deposition p. 141, JA p. 127). Scott then told Dickow that Rothhaupt has done this before. *Id.*

Deputy Dickow then asked for permission to obtain the tumblers from the back seat of the car. Petitioner denied Deputy Dickow permission to enter his car. (R.21, Rothhaupt deposition p. 141, JA p. 127). Deputy Dickow then yelled at Petitioner to exit the car; Petitioner complied immediately. (R.21, Rothhaupt deposition p. 142, JA p. 128). Deputy Dickow then ordered Petitioner to turn around and place his hands on the roof of the car, and Petitioner complied. (R.21, Rothhaupt deposition p. 142, JA p. 128). Deputy Dickow patted Petitioner down, and, finding nothing, ordered Petitioner to turn around and began to interrogate him. (R.21, Rothhaupt deposition p. 143, JA p. 129).

At some point during the questioning, Deputy Dickow asked Petitioner if he had any firearms or illegal drugs in the car. Petitioner replied he was carrying a rifle and explained his reason for having the rifle. (R.21, Rothhaupt deposition p. 144, JA p. 130)

Deputy Dickow then asked Petitioner to stand behind the back of the car, Dickow conferred with Scott outside the hearing of Petitioner. (R.21, Rothhaupt deposition pp. 145-46, JA pp. 131-32) Several minutes later, Deputy Dickow placed handcuffs on Petitioner and asked him again if he had ever been arrested. Petitioner said he had not. (R.21, Rothhaupt deposition p. 146, JA p. 132). When asked where the rifle was, Petitioner told Deputy Dickow the rifle was in the foot well of the rear seat. (R.21, Rothhaupt deposition p. 147, JA p. 133). Deputy Dickow then placed Petitioner in the rear of his police cruiser. (R.21, Rothhaupt deposition p. 147, JA p. 133).

Petitioner was seated in the back of the cruiser and had a clear view of who entered his car and what was removed. He saw Deputy Dickow enter the car and uncover his rifle and remove it. He then began to search through the rifle case. (R.21, Rothhaupt deposition pp. 150-52, JA pp. 134-36). In the meantime, Scott joined in the search of Petitioner's car and removed the box of tumblers. (R.21, Rothhaupt deposition pp. 150-52, JA pp. 134-36).

Eventually, another officer, Deputy Mefford, arrived at the scene. (R.21, Rothhaupt deposition p. 153, JA p. 137). Deputy Mefford also began searching Petitioner's car. (R.21, Rothhaupt deposition p. 153, JA p. 137). At some point, Dickow, Scott and Deputy Mefford began searching through Petitioner's personal papers. (R.21, Rothhaupt deposition p. 157, JA p. 140). Deputy Dickow then got into the cruiser with Petitioner and informed him he was "under arrest for trespassing in the third" and then drove away. (R.21, Rothhaupt deposition p. 158, JA p. 141). Petitioner

was taken to the Carroll County Detention Center where he was held overnight. (R.21, Rothhaupt deposition p. 162, JA p. 142).

Even on direct examination by his own counsel, Deputy Dickow admitted that he arrested Petitioner for criminal trespass in the third degree and harassing communications. (R.95, Trial Transcript, Volume 1, p. 60, JA p. 295). He also admitted that he added the two additional charges of stalking and theft by deception later on. *Id.* According to Rothhaupt, it was not until the next morning that he was informed by Deputy Dickow what the additional charges were against him. (R.21, Rothhaupt deposition pp. 171 & 176, JA pp. 143-44).

After Petitioner posted the $15,000.00 bond for his release and was attempting to reclaim his vehicle and possessions, he was stopped by Deputy Dickow and informed there was a problem with his car. (R.21, Rothhaupt deposition pp. 173–176, JA pp. 422-426). Deputy Dickow told Petitioner the problem was that "drugs" had been found in his car. The "drugs" found in Petitioner's car were: caffeine tablets, aspirin and Ibuprofen. (R.21, Rothhaupt deposition p. 176, JA p. 144). Petitioner had a prescription for the Ibuprofen. (R.21, Rothhaupt deposition p. 178, JA p. 145).

Petitioner was again "arrested and charged" and placed in jail by Deputy Dickow for approximately 10–20 minutes. (R.21, Rothhaupt deposition p. 179, JA p. 146). Petitioner overheard an argument between Deputy Dickow and Deputy Jailer Meadows regarding Petitioner being brought back into jail. (R.21, Rothhaupt deposition p. 180, JA p. 147). Petitioner's

bond was continued at $15,000.00, and he was once again released. (R.21, Rothhaupt deposition pp. 180-81, JA pp. 147-48).

The prescription drug charge and theft by deception charges were dismissed before the Petitioner's criminal trial. Petitioner went to trial on March 7, 2002. The trial judge dismissed the stalking charge at the close of the prosecution's case in chief. At the end of all proof, the Jay Rothhaupt was acquitted on the remaining charges.

REASONS FOR GRANTING THE PETITION

Granting the Petition for Writ of Certiorari will enable this Court to provide much needed guidance on what evidence is allowable when a jury is considering the facts within the arresting officer's knowledge to determine whether a reasonable officer would find probable cause sufficient to make an arrest. In considering the actions of a reasonably prudent person, the jury should be permitted to know what facts the officer knew at the time he made the decision to arrest. In this case, the deputy knew Kentucky law did not permit him to make an arrest when the misdemeanor was committed outside his presence. The Sixth Circuit misinterpreted prior Sixth Circuit precedent in upholding the exclusion of evidence, as well as the jury instruction pertaining to Kentucky law and the deputy's knowledge thereof.

I. The Court Should Have Allowed the Petitioner to Introduce Evidence of Kentucky Law to show the Deputy Lacked Probable Cause.

Deputy Dickow's knowledge of Kentucky law is key to a jury's determination of probable cause. The arrest made by Deputy Dickow based on trespass (and other misdemeanors), lacked probable cause as the alleged misdemeanors did not occur in his presence. Deputy Dickow admitted (in deposition testimony which was not presented to the jury) he was aware of Kentucky law limiting his power to arrest. (R.27, deposition of Ron Dickow, pp. 14-16, JA pp. 162-64). Despite his knowledge of Kentucky law, he arrested Petitioner without authority to do so. This information should have been presented to the jury in considering all facts within the deputy's knowledge at the time of the arrest.

The Sixth Circuit misinterpreted the prior holding of this Court, as well as its own prior decisions, when citing *Pyles v. Raisor*, 60 F.3d 1211 (6th Cir. 1995), for the proposition that "a constitutional claim for false arrest does not arise from the Defendant's [Respondent's] failure to comply with state law, but rather from his actions in arresting the Plaintiff [Petitioner] without probable cause." (Sixth Circuit Opinion, App. 6a-7a). The constitutional claim arises because Petitioner was arrested *without* probable cause and the jury was not permitted to consider evidence critical to a determination of state of mind. In the case submitted to this Court for review, the jury was asked to determine whether probable cause existed to support Petitioner's arrest; yet, the jury was

not instructed as to "the facts within the officer's knowledge"—denying the jury the opportunity to consider what a "prudent person" in these circumstances would have considered probable cause. See *Michigan v. DeFillippo*, 443 U.S. 31, 99 S.Ct. 2627, 61 L.Ed.2d 343 (1979); *see also Gerstein v. Pugh*, 420 U.S. 103, 111, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975).

The arresting officer was a sheriff's deputy, trained under Kentucky law. Deputy Dickow knew Kentucky law prohibited Petitioner's arrest under the circumstances. (R.27, deposition of Ron Dickow, pp. 14-16, JA pp. 162-64). Defendant Dickow is a deputy with the power, under Kentucky law, to arrest for only limited crimes occurring outside his presence. The misdemeanors with which Petitioner was charged were not among those offenses. The limited offenses are: "DUI, domestic violence 4th degree assault, violation of EPO/DVO, and shoplifting TBUT under three hundred." (R.26, deposition of Charlie Maiden, p. 12, JA p. 157). The Carroll County Sheriff's Office Policy and Standard Procedure Manual (Chapter 1, page 7) cites KRS 431.005 and provides this information. (R.32, Plaintiff's Memorandum in Support of Response to Motion for Summary Judgment, Exhibit A, p. 26, JA p. 206).

This Court has defined "probable cause" for an arrest as the "facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." *Michigan v. DeFillippo, supra.* Under the circumstances, it is not reasonable to

believe Deputy Dickow thought he had sufficient basis upon which to arrest Petitioner. In fact, he knew he did not have, under Kentucky law, the right to arrest him. With this knowledge, a jury would not have found Deputy Dickow to have had probable cause to arrest Petitioner.

This Court must find the Sixth Circuit's reliance on *Pyles v. Raisor* as wholly incorrect. Prior Sixth Circuit cases have accurately held that state law must be introduced and considered in determining the reasonableness of an officer's conduct. In *Estate of Dietrich v. Burrows*, 167 F.3d 1007, 1013-1014 (6th Cir. 1999), as well as *Painter v. Robertson*, 185 F.3d 557, 571 (6th Cir. 1999), evidence of state law was used to demonstrate that an officer could not have had the requisite probable cause at the time of the arrest. In *Estate of Dietrich* the Sixth Circuit affirmed a district court's finding that plaintiffs had established a valid Fourth Amendment claim. Plaintiffs demonstrated the officers were aware of the law giving them permission to carry a concealed weapon; therefore, the arrest for carrying a concealed weapon lacked the probable cause necessary under the Fourth Amendment. See also *Painter v. Robertson, supra* ("that probable cause determinations involve an examination of all of the facts and circumstances within an officer's knowledge at the time of an arrest" citing *Carroll v. United States*, 267 U.S. 132 (1925).) *Dietrich, supra*, was relied upon in *Gardenshire v. Schubert*, 205 F.3d 303 (6th Cir. 2000) for the proposition that a jury must consider all evidence of the officer's state of mind at the time of the arrest.

Using this analysis, if there were factors (in this case, Kentucky law) making it unreasonable for Deputy Dickow to believe that he had probable cause to arrest Petitioner, then, the jury must have been permitted to consider this factor. It was reversible error to prevent the jury from hearing the testimony of Deputy Dickow as to his training and understanding of KRS 431.005. It was also reversible error to prevent the jury from receiving a jury instruction on Kentucky law to determine the reasonableness (or lack thereof) of the deputy's conduct in arresting Petitioner.

Deputy Dickow admitted in his deposition testimony (which was excluded from the trial) that he is responsible for knowing the law and knowing what crimes and in what situations he can arrest. He admitted that under KRS 431.005 he could not have arrested Petitioner because it permitted arrest for a misdemeanor committed outside his presence in very limited circumstances. He even admitted that the "four" charges ultimately placed on Petitioner are not included in those limited circumstances. A jury should have been permitted to hear that Deputy Dickow was aware of the law and knowingly arrested him in violation thereof.

The Sixth Circuit erroneously upheld the district court, citing *Pyles v. Raisor* for a holding that is irrelevant to this case. Other cases more closely analogous to the issue this Court is asked to decide have held that all facts and information in the possession of the arresting officer must be presented to the jury. Similarly, the *Pyles* case was distinguished in *Thomas v. Cohen*, 304 F3d 563 (6th Cir. 2002) for the same reason this Court must reverse and clarify the

law here. In *Thomas*, the Sixth Circuit permitted introduction of state law to establish a constitutional violation—explaining that a federal constitutional violation may occur by interference with a process or a right due under state law. This is precisely the case and argument at hand. Petitioner sought to introduce evidence of the state law, not to prove a case based upon its violation; instead, to prove an interference with Petitioner's rights under the law of which Deputy Dickow was aware at the time he made the arrest. Deputy Dickow's knowledge of the Petitioner's rights under the law at the time of the arrest is most assuredly relevant to the jury's consideration of "all the facts within the officer's knowledge." *Michigan v. DeFillippo, supra.*

II. The Instructions Must Conform to the Facts

During the trial, Deputy Dickow testified as to the two charges for which he arrested Petitioner. On cross examination of Deputy Dickow, he testified that he only arrested Petitioner for 1). criminal trespass third degree; and 2). harassing communications. (R.95, Trial Transcript, Volume 1, p. 36, JA p. 289). In addition, Petitioner's Exhibit Two, which was part of his jail record, included only one charge at the time of arrest-- criminal trespass third degree. Even on direct examination by his own counsel, Deputy Dickow admitted that he arrested Petitioner for criminal trespass in the third degree and harassing communications. (R.95, Trial Transcript, Volume 1, p. 60, JA p. 295). Deputy Dickow notified Petitioner at the time of the arrest he was being arrested for criminal trespass in the third degree. Petitioner did

not learn of additional charges until the next morning. (R.95, Trial Transcript, Volume 1, pp. 88-95, JA pp. 308-15). In the Respondent's case in chief, evidence of only two charges was ever presented. Deputy Dickow was asked by his own counsel about Petitioner's arrest and he stated that he charged him only with: "criminal trespassing third, and also harassing communications." (R.96, Trial Transcript, Volume 2, p. 12, JA p. 380).

Based on the undisputed testimony from Deputy Dickow, undersigned counsel once again requested the trial court limit the jury instructions and delete these two charges from the Jury Instruction number 11 to include only the two charges for which he was initially arrested. (R. 96, Trial Transcript, Volume 2, pp. 34-36, JA pp. 387-89). The trial court denied counsel's request to alter the Jury Instructions. Should this case be remanded, Petitioner seeks a ruling that the instructions specifically conform to the facts and law of this case.

III. The Instructions Were Prejudicial

The Sixth Circuit was very specific in it's first Opinion (case number 04-5868), when it found as a matter of law that Dickow impermissibly relied on Scott's naked assertions without any further investigation. (R.50, Opinion of USCA, pp. 7-8, JA pp. 220-21). The Appellate Court was clear that the main reason the Court believed Dickow's actions were unreasonable in the situation before us was that Dickow was aware that Seldon Scott had a personal interest in the matter, the alleged victim (Scott) had an ongoing dispute with Rothhaupt, and claims of an

interested party involved in a contentious dispute should be viewed in a skeptical light. (*Id.* at 8, JA 221). The Court pointed to *Radvansky v. City of Olmstead Falls*, 395 F.3d 291, 309 (6th Cir. 2005) as the legal basis for its opinion. *Id.*

At the jury trial of this matter, the Trial Judge inserted prejudicial language in the Jury Instruction number 11. The prejudicial language was inserted at the end of the definition of "probable cause" and the language inserted was not in line with the facts of this case or the law of the case as the Appellate Court previously held. The very last sentence of the "probable cause" definition is as follows: "[o]nce an officer establishes probable cause, he is under no obligation to continue investigating and may, instead pursue the arrest of the subject." (R.100, 3/20/07, Jury Instructions, p. 14, JA p. 251). Petitioner's counsel preserved this argument for appeal by his contentious objection to the added language and all other objectionable issue with the instructions at the close of proof and before the instructions were tendered to the jury. (R. 96, Trial Transcript, Volume 2, pp. 34-47, JA pp. 387-400). Starting on page 37 of volume 2 of the transcript, undersigned counsel requested that this sentence be stricken and in its place, two sentences from the Appellate Court's previous Opinion be inserted instead. (R. 96, Trial Transcript, Volume 2, pp. 37-47, JA pp. 387-400).

Interestingly, the language that counsel objected and stills objects to was taken from another 6th Circuit Opinion that was decided 5 days prior to the trial in the within action. The case discussed was *Boykin v. Van Buren Township*, 479 F.3d 444 (6th Cir. 2007).

Undersigned counsel tried to stress to the Trial Court that the language from the *Boykin* opinion was improper and prejudicial to the Appellant for several reasons. (R. 96, Trial Transcript, Volume 2, pp. 37-47, JA pp. 387-400). The specific reasons now follow.

The facts of *Rothhaupt vs. Dickow* and *Boykin* are clearly distinguishable and the holding in either one should not be used in the probable cause analysis of the other. In *Rothhaupt*, the Sixth Circuit found probable cause lacking primarily because of the "who," "what," "why" and "how" the information came to the arresting officer Dickow. The Court found that the information relied upon by Dickow was unreliable under the facts within and therefore Dickow would be required to do a further investigation in order to establish "probable cause." (R.50, Opinion, pp. 7-8, JA pp. 220-21). In *Boykin*, the Court held that the source and manner of the communication of the information to the arresting officers to be perfectly credible and uncontroverted at the time of arrest, that probable cause had been established at the time of arrest, and once probable cause is determined, no further investigation is necessary. "If the tip had lacked the indicia of reliability essential to support probable cause, then the officers would have violated the Fourth Amendment by arresting Boykin." *Boykin* at 450, *citing Illinois v. Gates*, 462 U.S. 213, 233 (1983).

In addition, the sentence added to the instructions is confusing and irrelevant as it is referring to an "investigation" that occurs apparently after probable cause is established. In Rothhaupt the jury is to make the determination of probable cause at the time of the arrest and stop right there. The main question that

the jury is being asked for relates to "probable cause" at the time of the arrest. It is therefore logical that anything that happens after "probable cause" is determined is completely irrelevant to that particular analysis. Fundamentally, the cases are very different and adding the language of *Boykin* to the *Rothhaupt* instructions was improper, prejudicial, and warrants reversal of this case.

VI. CONCLUSION

For these reasons, Petitioner asks that this Petition for Writ of Certiorari be granted so that this Court can clarify that state law is admissible in deciding whether a constitutional right has been violated. The Sixth Circuit erroneously applied *Pyles v. Raisor* to exclude evidence of state law and an officer's knowledge of the law on the mistaken belief that such evidence was not relevant to a constitutional claim. In addition, the Court erroneously instructed the jury as to the facts and the law.

Respectfully Submitted,

Garry R. Adams, Jr.
Counsel of Record
CLAY & ADAMS, PLLC
Meidinger Tower, Suite 1730
462 S. Fourth Avenue
Louisville, KY 40202
(502) 561-2005

Counsel for Petitioner, Jay Rothhaupt

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 07-5425 & 07-5541

[Filed July 30, 2008]

JAY HOWARD ROTHHAUPT,

Plaintiff-Appellant, Cross-Appellee

v.

CHARLIE MAIDEN, JR., Individually and in his official capacity as Carroll County Sheriff; SELDON SCOTT, Individually and in his official capacity as Special Deputy, Director of Public Safety; PHYLLIS SCOTT,

Defendants,

RON WAYNE DICKOW, Individually and in his official capacity as Deputy Carroll County Sheriff,

Defendant-Appellee Cross-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

ORDER

Before: SILER, BATCHELDER, and ROGERS, Circuit Judges.

Jay Howard Rothhaupt appeals a district court judgment that dismissed his civil rights action filed under 42 U.S.C. § 1983. The court's judgment was based on a jury verdict which found that a deputy sheriff had probable cause to arrest Rothhaupt for trespassing and other charges. The deputy, Ron Wayne Dickow, has filed a cross-appeal. The parties have waived oral argument, and we unanimously agree that it is not needed in this case. Fed. R. App. P. 34(a).

Rothhaupt filed his complaint in 2002, primarily alleging that a county sheriff (Maiden), a deputy sheriff (Dickow), and a special deputy (Scott) had violated his constitutional rights by arresting him without probable cause, subjecting him to false imprisonment, and depriving him of his property without due process of law. The district court initially granted the defendants' motion for summary judgment on June 21, 2004. In so ruling, the court found that Dickow was entitled to qualified immunity regarding Rothhaupt's false arrest claim. That ruling was vacated on appeal and the case was remanded for further proceedings. *Rothhaupt v. Maiden*, 144 F. App'x 465, 472 (6th Cir. 2005). However, the district court's judgment was affirmed in all other respects.

A trial was held upon remand, and the jury found that Dickow had probable cause to arrest Rothhaupt on charges of third-degree trespassing, second-degree stalking, and making harassing communications. The district court entered a final judgment in Dickow's favor on March 20, 2007.

Our court described the background of this case when it decided Rothhaupt's prior appeal:

> Rothhaupt, who lives in Colorado, purchased four Pfaltzgraff Heritage tumblers on eBay from Kentucky residents Seldon and Phyllis Scott for $59.00. Upon receiving the tumblers, Rothhaupt noticed flaws not mentioned in their eBay description. He complained to the Scotts via e-mail, and both sides exchanged e-mails over several days to resolve the dispute. Rothhaupt remained unsatisfied, however, even after the Scotts offered a full refund plus return shipping costs.
>
> . . . .
>
> Scott, who served as a special deputy with the Carroll County, Kentucky, Sheriff's Department, shared some details of this dispute with his co-workers, including Deputy Ron Dickow. He also contacted other eBay sellers who reported similar experiences with Rothhaupt.
>
> In September 2001, Rothhaupt drove from Colorado to Pennsylvania to visit his mother. He brought . . . the tumblers, thinking he might hand-deliver them to the Scotts in Kentucky if time permitted.

On September 21, 2001, Rothhaupt called the Scotts' house, and Mrs. Scott answered. Rothhaupt did not identify himself, but told her he had a delivery and wanted to make sure someone would be there to receive it. Mrs. Scott asked where the package was from, and Rothhaupt told her it was from Colorado. She then asked Rothhaupt to wait, and said her husband would talk to him. But Rothhaupt hung up because he had the information he wanted: the Rothhaupts were home.

A few minutes later, Rothhaupt arrived at the Scotts' house and approached the door, carrying an open box and a clipboard with the printed-out e-mail exchanges. He told Mr. Scott the package was "an Ebay return from Jay Rothhaupt in Colorado Springs, [and] the COD is $100.00." Mr. Scott asked Rothhaupt who he was with. After some confusion . . ., Rothhaupt declared, "I'm Jay Rothhaupt."

Scott then turned to his wife and told her to phone the police. The parties dispute what happened next. Rothhaupt claims Scott stated, "I'm a law enforcement officer, stay there." Rothhaupt claims he then asked if Scott was refusing the shipment, and after Scott said yes, he returned to his car. Scott, however, alleges that after Rothhaupt gave his name, Scott repeatedly ordered him to leave the property, and Rothhaupt did so within about one minute, after several requests.

As Rothhaupt drove away from the Scotts' house, Mr. Scott began following him in his car. Soon Dickow, responding to Mrs. Scott's police call, stopped Rothhaupt's car on Interstate

71. . . . Scott told Dickow that Rothhaupt had called the house without identifying himself to find out if anyone was home, arrived at the Scotts' house uninvited, and then refused to leave when ordered to do so.

Dickow then approached Rothhaupt's car and asked Rothhaupt if he had been to the Scotts' house. Rothhaupt admitted he had, but claimed he had written permission to be there. . . . Dickow ordered Rothhaupt out of the car and frisked him, finding no weapons. . . . Rothhaupt denied having been arrested or possessing drugs, but said he had a rifle in the footwell of the back seat. He explained that he had the rifle because he was coming from Pennsylvania, where he had used it for target practice.

Dickow walked back to the police car and conferred with Scott again. Scott repeated his claim that Rothhaupt had refused to leave the Scotts' property when ordered to do so. Dickow then walked back to Rothhaupt and placed him under arrest, handcuffing him and putting him in the back of the police car. Dickow then searched Rothhaupt's car, where he found the rifle, among other things. Scott and another deputy who arrived, Medford, also helped search. According to Rothhaupt, Scott told Medford, "This is the guy I told you about at the station who's been doing this stuff to Ebayers and threatened me with fraud."

Dickow eventually charged Rothhaupt with second-degree stalking, harassing communications, theft by deception, and third-degree criminal trespass. While Rothhaupt was

> held in the county jail and his car was impounded, Dickow applied for and obtained a search warrant. Searching the car again, he found several medications in a black film container . . ., which he believed were prescription medication. Rothhaupt posted bond and was released from the detention center the next day. . . . Dickow arrested Rothhaupt again as he left the detention center for possessing prescription medication not in its original container. Rothhaupt was released shortly thereafter without posting additional bond.
>
> The prescription-drug and theft-by-deception charges were eventually dropped, but Rothhaupt was tried on the other three charges. The trial judge dismissed the stalking charge at the close of the prosecution's case-in-chief, and the jury acquitted Rothhaupt on the other two charges.

Rothhaupt, 144 F. App'x at 467-68.

Rothhaupt now argues that the trial court should have allowed him to introduce evidence of a state law that limits an officer's authority to make a misdemeanor arrest for an offense that is not committed in his presence. *See* Ky. Rev. Stat. § 431.005. We review this evidentiary ruling for an abuse of discretion. *See Nida v. Plant Protection Ass'n Nat'l*, 7 F.3d 522, 527 (6th Cir. 1993). The court did not abuse its discretion here because a cognizable claim under 42 U.S.C. § 1983 requires a violation of the plaintiff's constitutional rights. *See Flagg Bros. v. Brooks*, 436 U.S. 149, 155-57 (1978). Thus, a constitutional claim for false arrest does not arise from

the defendant's failure to comply with state law, but rather from his actions in arresting the plaintiff without probable cause. *See Pyles v. Raisor*, 60 F.3d 1211, 1215 (6th Cir. 1995).

In addition, Rothhaupt argues that the trial court erred by denying his motions for a directed verdict. We review this argument de novo. *See Moore v. KUKA Welding Systems & Robot Corp.*, 171 F.3d 1073, 1078 (6th Cir. 1999). "Only when . . . reasonable people could come to but one conclusion from the evidence should a court grant a motion for directed verdict." *Lewis v. City of Irvine*, 899 F.2d 451, 454-55 (6th Cir. 1990). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

Rothhaupt argues that Dickow's testimony indicated that he did not understand the elements of stalking and theft by deception. However, the proper focus is on Dickow's state of mind at the time of the arrest, an event that occurred years before he gave the testimony on which Rothhaupt now relies. *See Klein v. Long*, 275 F.3d 544, 550 (6th Cir. 2001). Moreover, the evidence was sufficient to create a jury question on the issues of whether there was probable cause to arrest Rothhaupt for stalking and theft by deception, as a reasonable juror could have found that he threatened the Scotts implicitly and tried to obtain $100 from them by creating the false impression that he was delivering a COD package. Thus, the district court properly denied his motions for a directed verdict.

Rothhaupt argues that the trial court failed to give a proper jury instruction on probable cause. We review the court's instructions as a whole to determine whether they adequately informed the jury of the relevant considerations and provided a basis in law for aiding the jury in its decision. *See Innes v. Howell Corp.*, 76 F.3d 702, 713-14 (6th Cir. 1996). The disputed instruction on probable cause provides in full as follows:

> There was probable cause for the arrest if, at the moment the arrest was made, the facts and circumstances within Officer Dickow's knowledge and of which he had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the plaintiff, Jay Rothhaupt, had committed one of the crimes for which he was arrested.
>
> Officer Dickow arrested the plaintiff on four charges: Trespassing in the third degree, stalking in the second degree, harassing communications, and theft by deception.
>
> It's not necessary that defendant Ron Dickow had probable cause to arrest the plaintiff for all of the crimes with which he was charged, so long as he had probable cause to arrest Rothhaupt for one of those crimes.
>
> Probable cause requires more than just suspicion, but it does not need to be based on evidence that would be sufficient to support a conviction or even a showing that defendant's belief was probably right.
>
> Once an officer establishes probable cause, he is under no obligation to continue

> investigating and may instead pursue the arrest of the suspect.

Rothhaupt argues that he was prejudiced by the district court's decision to insert the last sentence of the instruction: "Once an officer establishes probable cause, he is under no obligation to continue investigating and may instead pursue the arrest of the suspect." However, this language is consistent with our court's prior opinions. *See, e.g., Boykin v. Van Buren Twp.*, 479 F.3d 444, 449 (6th Cir. 2007); *Crockett v. Cumberland Coll.*, 316 F.3d 571, 581 (6th Cir. 2003).

Rothhaupt also argues that the trial court's instructions should have included the following language from the prior opinion in his own case:

> "[A] mere allegation [of criminal behavior], while possibly justifying a brief investigatory detention, is insufficient by itself to establish probable cause that a crime had been committed." *Id.* at 305. To establish probable cause in the face of such a naked allegation, an officer must investigate further and find objective factors to corroborate the claim.

Rothhaupt, 144 F. App'x at 469 (quoting *Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 305 (6th Cir. 2005)). This argument fails because the jury was also instructed that probable cause required "reasonably trustworthy information" that was "sufficient to warrant a prudent man in believing that" Rothhaupt had committed the crimes with which he was charged. Thus, the jury was adequately advised of the kind of

information that was required in making a finding of probable cause. *See Rothhaupt*, 144 F. App' x at 469 (quoting *Beck v. Ohio*, 379 U.S. 89, 91 (1964)).

Rothhaupt also argues that the instructions were not consistent with the proof at trial which indicated that he was not initially arrested for stalking or theft by deception. However, the disputed instruction was consistent with evidence that these charges were added to the citation when Rothhaupt and Dickow arrived at the jail. Furthermore, the court properly instructed the jury that an arrest may be justified if there is probable cause on one of the charges, even if there was not probable cause to arrest on the others. *See Devenpeck v. Alford*, 543 U.S. 146, 153 (2004).

Finally, Rothhaupt argues that the court should have allowed evidence of his arrest for possessing prescription drugs that were not in their original container, as this evidence was relevant to the assessment of punitive damages. However, Rothhaupt was not entitled to relief because the jury found that there was probable cause to arrest Rothhaupt on charges of trespassing, stalking, and making harassing communications. Thus, Dickow was not liable for any damages and the exclusion of evidence relevant to punitive damages was, if error at all, harmless error. *See United States v. Johnson*, 440 F.3d 832, 847 (6th Cir. 2006).

In his cross-appeal, Dickow argues that the district court made several evidentiary errors and that he was entitled to a directed verdict on grounds of qualified immunity. We need not reach these arguments

because there are insufficient grounds for disturbing the underlying judgment in his favor.

Accordingly, the district court's judgment is affirmed.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green
Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
at Frankfort

Case No. 3:02-CV-84-KKC

[Filed March 20, 2007]

JAY HOWARD ROTHHAUPT)
)
v.)
)
RON WAYNE DICKOW, Individually)

JUDGMENT IN A CIVIL CASE

X **Jury Verdict.** This action came before the Court for trial by jury. The issues have been tried and the jury has rendered its verdict.

* * *

IT IS ORDERED AND ADJUDGED

that Judgment is hereby entered on behalf of the defendant, Ron Wayne Dickow, against the Plaintiff, Jay Howard Rothhaupt.

March 20, 2007
Date

/s/
KAREN K. CALDWELL, JUDGE
UNITED STATES DISTRICT COURT

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION at FRANKFORT

CIVIL ACTION NO. 02-CV-84-KKC

[Filed March 20, 2007]

JAY HOWARD ROTHHAUPT,
Plaintiff,

v.

RON WAYNE DICKOW, *individually*,
Defendant.

VERDICT FORM

INTERROGATORY NO. 1

Has Jay Rothhaupt proved by a preponderance of the evidence that Ron Dickow arrested him without probable cause for all four of the charges for which he was arrested?

_____ YES __✓__ NO

– If you answered "Yes" to this interrogatory, please proceed to **Interrogatory No. 2 on the next page.**

– If you answered "No" to this interrogatory, do you find that Jay Rothhaupt was arrested without probable cause for:

1) trespassing in the third degree?
_____ YES ____✓____ NO
(no probable cause)(probable cause)

2) stalking in the second degree?
_____ YES ____✓____ NO
(no probable cause)(probable cause)

3) harassing communications?
_____ YES ____✓____ NO
(no probable cause)(probable cause)

4) theft by deception?
____✓____ YES_____ NO
(no probable cause)(probable cause)

– Please sign and date this form on the last page and notify the Court Security Officer that you are ready to return to the Courtroom.

* * *

3/20/2007 /s/_____
DATE FOREPERSON'S SIGNATURE

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 04-5868

[Filed: July 20, 2005]

JAY HOWARD ROTHHAUPT,
Plaintiff-Appellant,

v.

CHARLIE MAIDEN, JR., Individually and in his official capacity as Carroll County Sheriff; RON WAYNE DICKOW, Individually and Deputy Carroll County Sheriff; SELDON SCOTT, Individually and in his official capacity as Special Deputy, Director of Public Safety; PHYLLIS SCOTT,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

Before: RYAN, MOORE, and COOK, Circuit Judges.

COOK, Circuit Judge. Jay Rothhaupt appeals the district court's grant of summary judgment for Defendants-Appellees on his federal and state-law claims arising out of his arrest by Defendant-Appellee Ron Dickow. Upon review, we reverse the district court's grant of qualified immunity to Dickow with respect to the arrest, but affirm its judgment in all other respects.

I. Background

This case begins with a sale through the auction website Ebay. Rothhaupt, who lives in Colorado, purchased four Pfaltzgraff Heritage tumblers on Ebay from Kentucky residents Seldon and Phyllis Scott for $59.00. Upon receiving the tumblers, Rothhaupt noticed flaws not mentioned in their Ebay description. He complained to the Scotts via e-mail, and both sides exchanged e-mails over several days to resolve the dispute. Rothhaupt remained unsatisfied, however, even after the Scotts offered a full refund plus return shipping costs.

Mr. Scott told Rothhaupt he felt harassed by the tone of Rothhaupt's e-mails, and suggested Rothhaupt call him to resolve the dispute. But Rothhaupt did not call. Instead, he continued sending e-mails, stating, for example: "Clearly there are additional things you can do to resolve the problem you've caused via your fraud, so your claim that you 'have done all that is possible' is false. Perhaps you're confusing the set of things you're *willing* to do with the set of things you *can* do." Rothhaupt also stated that he intended to file fraud reports with Ebay and the United States Postal Service.

Scott, who served as a special deputy with the Carroll County, Kentucky, Sheriff's Department, shared some details of this dispute with his co-workers, including Deputy Ron Dickow. He also contacted other Ebay sellers who reported similar experiences with Rothhaupt.

In September 2001, Rothhaupt drove from Colorado to Pennsylvania to visit his mother. He brought with him a rifle to practice target shooting at his mother's house, in preparation for an elk hunt later that year. He also brought the tumblers, thinking he might hand-deliver them to the Scotts in Kentucky if time permitted.

On September 21, 2001, Rothhaupt called the Scotts' house, and Mrs. Scott answered. Rothhaupt did not identify himself, but told her he had a delivery and wanted to make sure someone would be there to receive it. Mrs. Scott asked where the package was from, and Rothhaupt told her it was from Colorado. She then asked Rothhaupt to wait, and said her husband would talk to him. But Rothhaupt hung up because he had the information he wanted: the Rothhaupts were home.

A few minutes later, Rothhaupt arrived at the Scotts' house and approached the door, carrying an open box and a clipboard with the printed-out e-mail exchanges. He told Mr. Scott the package was "an Ebay return from Jay Rothhaupt in Colorado Springs, [and] the COD is $100.00." Mr. Scott asked Rothhaupt who he was with. After some confusion about what that question meant, Rothhaupt asked, "Do you want

to know my identity?" After Scott said yes, Rothhaupt declared, "I'm Jay Rothhaupt."

Scott then turned to his wife and told her to phone the police. The parties dispute what happened next. Rothhaupt claims Scott stated, "I'm a law enforcement officer, stay there." Rothhaupt claims he then asked if Scott was refusing the shipment, and after Scott said yes, he returned to his car. Scott, however, alleges that after Rothhaupt gave his name, Scott repeatedly ordered him to leave the property, and Rothhaupt did so within about one minute, after several requests.

As Rothhaupt drove away from the Scotts' house, Mr. Scott began following him in his car. Soon Dickow, responding to Mrs. Scott's police call, stopped Rothhaupt's car on Interstate 71. Scott, still following Rothhaupt, pulled over behind the other two cars. Dickow spoke to Scott before speaking with Rothhaupt. Scott told Dickow that Rothhaupt had called the house without identifying himself to find out if anyone was home, arrived at the Scotts' house uninvited, and then refused to leave when ordered to do so.

Dickow then approached Rothhaupt's car and asked Rothhaupt if he had been to the Scotts' house. Rothhaupt admitted he had, but claimed he had written permission to be there. Dickow asked to see the tumblers, which were in the back of the car, but Rothhaupt denied Dickow permission to enter the car. Dickow ordered Rothhaupt out of the car and frisked him, finding no weapons. Dickow then asked Rothhaupt if he had ever been arrested or if he had any illegal drugs or firearms in the vehicle. Rothhaupt

denied having been arrested or possessing drugs, but said he had a rifle in the footwell of the back seat. He explained that he had the rifle because he was coming from Pennsylvania, where he had used it for target practice.

Dickow walked back to the police car and conferred with Scott again. Scott repeated his claim that Rothhaupt had refused to leave the Scotts' property when ordered to do so. Dickow then walked back to Rothhaupt and placed him under arrest, handcuffing him and putting him in the back of the police car. Dickow then searched Rothhaupt's car, where he found the rifle, among other things. Scott and another deputy who arrived, Medford, also helped search. According to Rothhaupt, Scott told Medford, "This is the guy I told you about at the station who's been doing this stuff to Ebayers and threatened me with fraud."

Dickow eventually charged Rothhaupt with second-degree stalking, harassing communications, theft by deception, and third-degree criminal trespass. While Rothhaupt was held in the county jail and his car was impounded, Dickow applied for and obtained a search warrant. Searching the car again, he found several medications in a black film container, including caffeine tablets, aspirin, and 800 milligrams of ibuprofen, which he believed were prescription medication. Rothhaupt posted bond and was released from the detention center the next day. Having found the ibuprofen during the search, Dickow arrested Rothhaupt again as he left the detention center for possessing prescription medication not in its original container. Rothhaupt was released shortly thereafter without posting additional bond.

The prescription-drug and theft-by-deception charges were eventually dropped, but Rothhaupt was tried on the other three charges. The trial judge dismissed the stalking charge at the close of the prosecution's case-in-chief, and the jury acquitted Rothhaupt on the other two charges.

Rothhaupt then brought this suit under 42 U.S.C. § 1983 in the district court against Sheriff Charlie Maiden, Dickow, and the Scotts, alleging violations of his constitutional rights and various pendent state-law claims. After a brief discovery period, the district court granted summary judgment for all defendants. It dismissed the claims against Phyllis Scott because she did not act under color of state law. It dismissed the claim against Maiden in his individual capacity because he was not personally involved in the incident. It dismissed the claims against defendants in their official capacities, because Rothhaupt had not demonstrated they were acting pursuant to a municipal custom or exhibited deliberate indifference to his constitutional rights. It held that Scott and Dickow had not violated Rothhaupt's constitutional rights—and were therefore entitled to qualified immunity—because they had reasonable suspicion to stop him and probable cause to arrest him, and the search of his car was incident to the arrest. Finally, after dismissing the federal claims, the court discontinued supplemental jurisdiction over the pendent state-law claims.

We review the district court's grant of summary judgment under the familiar *de novo* standard. *Boone v. Spurgess*, 385 F.3d 923, 927 (6th Cir. 2004). And in determining whether the defendants enjoy qualified

immunity, we consider: (1) "whether, based upon the applicable law, the facts viewed in the light most favorable to the plaintiffs show that a constitutional violation has occurred;" (2) "whether the violation involved a clearly established constitutional right of which a reasonable person would have known;" and (3) "whether the plaintiff has offered sufficient evidence to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established constitutional rights." *Feathers v. Aey*, 319 F.3d 843, 848 (6th Cir. 2003) (internal citations and quotation marks omitted).

II. The Stop

We agree with the district court that Dickow and Scott are immune with respect to the initial stop, because it was constitutional. "[W]here a law enforcement officer lacks probable cause, but possesses a reasonable and articulable suspicion that a person has been involved in criminal activity, he may detain the suspect briefly to investigate the suspicious circumstances." *United States v. Bentley*, 29 F.3d 1073, 1075 (6th Cir. 1994) (citing *Terry v. Ohio*, 392 U.S. 1 (1968)).

Here, a dispatcher told Dickow that Mrs. Scott had reported a suspicious person who refused to leave her property. Dickow knew the car he pulled over belonged to that suspicious person. Thus it was reasonable for Dickow to stop Rothhaupt. Rothhaupt argues that the stop was unjustified because his alleged crimes did not occur in Dickow's presence. But the Constitution imposes no such requirement. *See Pyles v. Raisor*, 60 F.3d 1211, 1215 (6th Cir. 1995) (Kentucky's

requirement that an officer personally witness a misdemeanor before making an arrest does not affect Fourth Amendment analysis).

III. The Arrest

We disagree with the district court on the propriety of the arrest, because Dickow lacked probable cause. Under the Fourth Amendment, an officer "may not seize an individual except after establishing probable cause that the individual has committed, or is about to commit, a crime." *Williams ex rel. Allen v. Cambridge Bd. of Educ.*, 370 F.3d 630, 636 (6th Cir. 2004). Probable cause depends on "whether at that moment [of arrest,] the facts and circumstances within [the officer's] knowledge and of which [he] had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [arrestee] had committed or was committing an offense." *Beck v. Ohio*, 379 U.S. 89, 91 (1964). This is typically a jury question, unless only one reasonable determination is possible. *Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 302 (6th Cir. 2005).

"[A] mere allegation [of criminal behavior], while possibly justifying a brief investigatory detention, is insufficient by itself to establish probable cause that a crime had been committed." *Id.* at 305. To establish probable cause in the face of such a naked allegation, an officer must investigate further and find objective factors to corroborate the claim. *See id.* at 308-09.

Here, at the moment of arrest, Dickow was faced with conflicting statements from Scott and Rothhaupt regarding whether Rothhaupt had permission to be on

the Scotts' property—and he impermissibly relied on Scott's assertions without any further investigation. True, he knew Scott from the sheriff's department and had heard him complain about an Ebay customer who "annoyed" him. But this did not suffice to elevate his reasonable suspicion to probable cause—especially in light of Scott's personal interest in the matter, both because Scott was the alleged trespass victim and because of Scott's ongoing dispute with Rothhaupt. *See id.* at 309 (claims of "an interested party involved in a contentious dispute . . . should be viewed in a skeptical light"). And, importantly, Dickow failed to properly investigate the matter by not even asking to see the written permission Rothhaupt claimed to have.[1] Nor, apparently, did he ask Rothhaupt for a detailed description of the events on the Scotts' property. Rothhaupt left the Scotts' property within minutes of being asked, even according to Scott

Considering all this in the light most favorable to Rothhaupt, as we must, we cannot say the evidence compels a conclusion that probable cause supported Rothhaupt's arrest for trespass, stalking, harassing

---

[1] Judge Ryan argues in dissent that "[n]o reasonable trier of fact could conclude . . . that Rothhaupt had written permission to come onto the Scotts' property." The focus, however, is on whether Dickow possessed reliable reasons for finding probable cause at the time of Rothhaupt's arrest. Dickow acted on Scott's information without evaluating Rothhaupt's "written permission" claim. We agree that if he had asked and investigated the matter further, he might have established probable cause. But the record lacks that requisite investigation.

communications, or theft by deception.[2] Thus, a reasonable jury could find that Dickow violated Rothhaupt's Fourth Amendment right, and we must next consider in assessing Dickow's qualified immunity entitlement, whether the right was clearly established, and whether Dickow's actions were objectively unreasonable in light of that right. *Feathers*, 319 F.3d at 848.

Without question, it was clearly established at the time of Rothhaupt's arrest that an arrest without probable cause was unconstitutional. *See Radvansky*, 395 F.3d at 310. In light of that right, and considering all facts in the light most favorable to Rothhaupt, Dickow's actions—making an arrest for a misdemeanor trespass and other non-violent offenses, based solely upon an interested party's

---

[2] Judge Ryan argues Dickow had probable cause to arrest for stalking and harassing communications. We find probable cause even weaker for these two offenses. Dickow does not even argue on appeal that he had probable cause to arrest for stalking—presumably because the record reveals no allegation that Rothhaupt explicitly or implicitly threatened sexual contact, physical injury, or death, as Kentucky's stalking statute requires. *See* Ky. Rev. Stat. Ann. § 508.150(1).

As for "harassing communications," these must serve "no purpose of legitimate communication." Ky. Rev. Stat. Ann. § 525.080(1). But here Dickow knew Rothhaupt's communications pertained to both his Ebay dispute and to determining whether the Rothhaupts were home so he could make a delivery—surely matters of "legitimate communication." It also appears that Dickow's knowledge of these communications, like his knowledge of the trespass, may have come entirely from Mr. Scott. (Dickow claims to have asked Rothhaupt about the phone call, but cannot recall Rothhaupt's response, and Rothhaupt's account of their encounter does not include any discussion of the phone call.)

allegations—were unreasonable. *See id.* We therefore reverse the district court's grant of qualified immunity for Dickow and remand the Fourth Amendment claim regarding Rothhaupt's arrest.

IV. The Search

The district court dismissed Rothhaupt's claim arising out of the search of his car after his arrest. We affirm because the search did not violate a clearly established constitutional right.

During an investigative stop, a police officer may search an automobile's passenger compartment, "limited to those areas in which a weapon may be placed or hidden," so long as he reasonably believes "the suspect is dangerous and . . . may gain immediate control of weapons." *Michigan v. Long*, 463 U.S. 1032, 1049 (1983). Here, Rothhaupt admitted to having a rifle in his car's passenger compartment. So although Dickow might have lacked probable cause to arrest Rothhaupt, he nonetheless could have searched the car for weapons as part of the *Terry* stop. Rothhaupt thus fails to allege a constitutional-rights violation, and we therefore affirm the district court's grant of qualified immunity with respect to the search.

V. Individual- Capacity Claims

We affirm the district court's dismissal of the claims against Mr. Scott and Sheriff Maiden in their individual capacities. An officer who did not participate in an arrest cannot be held liable for constitutional violations arising out of that arrest. *Radvansky*, 395 F.3d at 311. Here, Scott did not

participate in Rothhaupt's arrest—he merely complained to Dickow, who made the arrest. And we have no evidence that Sheriff Maiden played any role in these events, either directly or indirectly by instructing Dickow.

VI. Official-Capacity Claims

We likewise affirm the district court's dismissal of the claims against Appellees in their official capacities. "Official-capacity suits . . . generally represent only another way of pleading an action against an entity of which an officer is an agent." *Kentucky v. Graham*, 473 U.S. 159, 165 (1985) (internal quotation marks omitted). An official-capacity claim "is *not* a [claim] against the official personally, for the real party in interest is the entity." *Id.* at 166. To establish liability in such a claim, the plaintiff must demonstrate that "the entity itself is a moving force behind the deprivation; thus, in an official-capacity suit the entity's policy or custom must have played a part in the violation of federal law." *Id.* (internal citations and quotation marks omitted).

In support of his official-capacity claim, Rothhaupt argues that his alleged rights violations resulted from Carroll County's failure to train its police officers. To succeed on this failure-to-train claim, Rothhaupt "must show prior instances of unconstitutional conduct demonstrating that the County has ignored a history of abuse and was clearly on notice that the training in this particular area was deficient and likely to cause injury." *Fisher v. Harden*, 398 F.3d 837, 849 (6th Cir. 2005). Rothhaupt fails to provide any such evidence—and the claim therefore fails.

VII. Due Process

Finally, we affirm the district court's dismissal of Rothhaupt's due-process claims.

Rothhaupt argues the Appellees deprived him of property without due process by keeping "extensive amounts" of his property seized during the search of his vehicle, including "hundreds of documents" and "several heirlooms." None of these items, however, is listed on the inventory of objects seized during the vehicle search. And while their absence from the list does not prove that police did not seize them, Rothhaupt offers no evidence that the items were ever actually in the vehicle.

The claim also fails because Rothhaupt does not show that existing state remedies are inadequate. "If satisfactory state procedures are provided in a procedural due process case, then no constitutional deprivation has occurred despite the injury." *Jefferson v. Jefferson County Pub. Sch. Sys.*, 360 F.3d 583, 587-88 (6th Cir. 2004); *see also Mitchell v. Fankhauser*, 375 F.3d 477, 481-84 (6th Cir. 2004) (plaintiff must plead inadequacy of state remedies where alleged due-process violation involved "a random or unauthorized act"). That is, Rothhaupt cannot claim a denial of due process without explaining why the existing process is inadequate—he "must prove the inadequacy of state remedies as an element of [his] constitutional tort." *Jefferson*, 360 F.3d at 588. Here, Rothhaupt fails to explain why a state tort remedy for conversion would not suffice to address his claim. *See Fox v. Van Oosterum*, 176 F.3d 342, 349 (6th Cir. 1999). The federal claim therefore fails.

VIII. Conclusion

For the foregoing reasons, we reverse the district court's grant of qualified immunity for Dickow on Rothhaupt's unlawful-arrest claim, and remand that claim to the district court for further proceedings. We affirm, however, dismissal of all the other claims.

RYAN, Circuit Judge, dissenting. My colleagues conclude that the district court's grant of summary judgment should be reversed because Dickow did not have probable cause to arrest Rothhaupt for the crimes with which he was charged. Because I believe Dickow had probable cause to arrest Rothhaupt, I respectfully dissent.

My colleagues reason that, given the conflicting statements as to whether Rothhaupt had permission to remain on the Scotts' property, Dickow impermissibly relied on Seldon Scott's statement alone without any further investigation, and thus did not have probable cause to arrest Rothhaupt on any grounds. During the traffic stop, Scott informed Dickow that he had "told [Rothhaupt] to leave," to which Rothhaupt responded: "No, you didn't, you said to stay." Rothhaupt also told Dickow that he had written permission to be on the Scotts' property, but there is no genuine issue of material fact as to whether Rothhaupt had such permission. At the time of his arrest, Rothhaupt had in his possession a printout of the e-mail exchanges between himself and Scott concerning the eBay sale of the tumblers. Apparently, Rothhaupt interpreted Scott's offer "to pay return shipping" as an invitation to Rothhaupt to travel from Colorado to the Scotts' home in Kentucky to personally

hand deliver the tumblers and demand cash on delivery. No reasonable trier of fact could conclude from this language or anything else in the record that Rothhaupt had written permission to come onto the Scotts' property, nor would it have undermined Scott's allegation of criminal trespass had Dickow read this document.

Given the evidence above, it is apparent that the facts are in dispute as to whether Scott ordered Rothhaupt to leave his property. Those conflicting statements, however, have real significance only for the criminal trespass charge. Dickow testified, and his citation confirms, that he initially arrested Rothhaupt, not only for criminal trespass, but also for harassing communications, stalking in the second degree, and theft by deception. My colleagues do not explain why the dispute as to whether Scott ordered Rothhaupt to leave his property, the resolution of which was necessary to determine whether Rothhaupt had committed a criminal trespass, necessarily eliminated probable cause for the other crimes for which Rothhaupt was arrested and charged. "[W]here no probable cause exists to arrest a plaintiff for a particular crime, but . . . probable cause exists to arrest that plaintiff for a related offense, the plaintiff cannot prevail in a suit alleging wrongful arrest brought pursuant to 42 U.S.C. § 1983." Voyticky v. Village of Timberlake, ---F.3d---, 2005 WL 1500900, at *4 (6th Cir. Jun. 22, 2005). Indeed, none of the other charged crimes require evidence that an arrestee remained unlawfully on another's property.

Even assuming Dickow did not have probable cause to arrest Rothhaupt for criminal trespass, there is

sufficient evidence from which a reasonable officer could conclude that there was probable cause to arrest Rothhaupt for stalking in the second degree. Under Kentucky law, stalking is "an intentional course of conduct . . . [d]irected at a specific person or persons . . . [w]hich seriously alarms, annoys, intimidates, or harasses the person or persons[,] and [w]hich serves no legitimate purpose." Kentucky Rev. Stat. Ann. § 508.130(1)(a). "A person is guilty of stalking in the second degree when he intentionally . . . [s]talks another person[] and [m]akes an explicit or implicit threat with the intent to place that person in reasonable fear of . . . [s]exual contact . . . [,] . . . [p]hysical injury[,] or [d]eath." Kentucky Rev. Stat. Ann. § 508.150(1).

In his citation, Dickow briefly explained why he arrested Rothhaupt for stalking in the second degree: "Subject drove from Colorado to Kentucky to deliver [a] package, would not [identify] self or contents in package." Dickow also testified regarding his reasons for arresting Rothhaupt for stalking in the second degree:

> I was notified by Seldon Scott, deputy, prior to Mr. Rothhaupt's arrest -- approximately six weeks -- stating that he was involved with a transaction through eBay with Mr. Rothhaupt.
>
> He had come to me and was concerned about what was going on. It did raise his level of safety -- that he had tried to work it out and finally he did state that through speaking and also e-mails that he didn't want no more communication with Mr. Rothhaupt. After that,

> the traffic stop, him showing up at the door, is what I classified as stalking.

Thus, Dickow was aware of the bizarre e-mail exchange arising from the eBay sale in which Scott ordered Rothhaupt to "quit harassing us." He knew that the Scotts were concerned for their "safety." Scott told Dickow at work that he was "alarmed" and "annoyed" by Rothhaupt's behavior. Dickow believed that Rothhaupt's uninvited and unanticipated presence at the Scotts' home in Kentucky, hundreds of miles away from Rothhaupt's home in Colorado, was strange, stalking-like behavior. Dickow knew that, upon arriving at the Scotts' home, Rothhaupt refused to identify himself or the contents of the package until he was asked several times to do so by Scott. At the traffic stop, Dickow learned from Scott that Rothhaupt had harassed other eBay users. A reasonable officer could legitimately infer from these facts that Rothhaupt's conduct was actually motivated by an intent to alarm and intimidate the Scotts, notwithstanding any legitimate purpose Rothhaupt claimed to have for his actions.

Dickow also had probable cause to arrest Rothhaupt for harassing communications. "A person is guilty of harassing communications when with intent to harass, annoy or alarm another person he . . . [c]ommunicates with a person . . . by telephone, telegraph, mail or any other form of written communication in a manner which causes annoyance or alarm and serves no purpose of legitimate communication[.]" Kentucky Rev. Stat. Ann. § 525.080(1)(a). In his citation, Dickow noted that the "subject telephoned deputy would not [identify] self,

then hung up on him, [and a] few minutes later shows up [at] residence." Dickow testified that, prior to the arrest, Scott informed him of the details underlying the harassing communications charge: "Basically, he explained to me that . . . one of them received a phone call approximately five minutes prior to this Mr. Rothhaupt showing up at his residence. The phone call was made. The gentleman wouldn't identify hisself [sic]. It alarmed . . . Phyllis [Scott]. She was concerned about it." Rothhaupt's phone call was sufficiently alarming that, after he hung up on her, Phyllis Scott went around the house locking all the doors.

To support their conclusion that Dickow lacked probable cause to arrest Rothhaupt, my colleagues rely primarily on the case of Radvansky v. City of Olmsted Falls, 395 F.3d 291 (6th Cir. 2005). In Radvansky, the plaintiff was arrested by the defendant police officers for burglary after the plaintiff broke into his own leased residence. Id. at 299-301. Because the plaintiff had paid most of his rent for the month, the court noted that the plaintiff was a current tenant, with a right to enter and occupy the residence, and thus could not be found liable for burglary. Id. at 304. The court rejected the argument that the defendant police officers had probable cause to arrest the plaintiff for a number of related but uncharged crimes, including breaking and entering, criminal trespass, and criminal mischief. Id. at 307 n.12. The court explained that, like the charged crime of burglary, the other crimes all required a showing of either criminal trespass or unprivileged activity. Id. The court thus concluded that, because "the police should have known [the plaintiff] was a current tenant entitled to 'custody and control' of the . . . residence, whether there was

probable cause to arrest [the plaintiff] for any of these other crimes is a disputed material fact as well." Id.

No similar conclusion can be reached here. While the facts may be in dispute as to whether Rothhaupt "remain[ed] unlawfully in or upon premises," Kentucky Rev. Stat. Ann. § 511.080(1), and thus whether Dickow had probable cause to arrest Rothhaupt for criminal trespass, the other crimes for which Rothhaupt was arrested—harassing communications, stalking in the second degree, and theft by deception—do not require evidence of a trespass to establish probable cause. It is of no significance that Rothhaupt was never convicted for any of the above offenses because "[t]he existence of probable cause to arrest . . . does not depend on actual criminal liability[.]" Radvansky, 395 F.3d at 304. Rather, whether Rothhaupt's arrest was constitutionally valid depends upon "whether, at the moment the arrest was made, . . . the facts and circumstances within [Dickow's] knowledge and of which [he] had reasonably trustworthy information were sufficient to warrant a prudent man in believing that [Rothhaupt] had committed or was committing an offense." Beck v. Ohio, 379 U.S. 89, 91 (1964).

Because I believe Dickow had probable cause to arrest Rothhaupt, at the very least, for harassing communications and stalking in the second degree, I respectfully dissent.

113

No. 08-568

Supreme Court, U.S.
FILED
NOV 25 2008
OFFICE OF THE CLERK

In The
Supreme Court of the United States

JAY HOWARD ROTHHAUPT,

Petitioner,

v.

RON WAYNE DICKOW, individually and in his official capacity as Deputy Carroll County Sheriff,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JEFFREY C. MANDO*
JENNIFER H. LANGEN
ADAMS, STEPNER, WOLTERMANN & DUSING PLLC
40 West Pike Street
P.O. Box 861
Covington, Kentucky 41012-0861
(859) 394-6200

Counsel for Respondent, Ron Wayne Dickow

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether the Sixth Circuit correctly affirmed the decision of the United States District Court for the Eastern District of Kentucky with regard to: (1) the exclusion of references at trial to a state law providing that police officers may not arrest subjects for misdemeanors not committed in the officer's presence and (2) the language contained in the jury instructions.

TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF THE QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 1

COUNTERSTATEMENT OF CASE 2

PROCEEDINGS BELOW 9

REASONS FOR DENYING THE PETITION 12

I. THE EXCLUSION OF K.R.S. § 431.005(1) DOES NOT PROVIDE A COMPELLING REASON TO JUSTIFY THE EXERCISE OF CERTIORARI IN THIS CASE 12

II. PETITIONER'S ARGUMENT RELATING TO THE JURY INSTRUCTIONS USED AT THE TRIAL OF HIS FOURTH AMENDMENT CLAIM DO NOT PRESENT A COMPELLING REASON TO JUSTIFY THE EXERCISE OF CERTIORARI 17

A. THE JURY INSTRUCTION FAIRLY AND ADEQUATELY SUBMITTED THE ISSUES AND APPLICABLE LAW TO THE JURY 18

B. THE JURY INSTRUCTION CONFORMED TO THE FACTS 27

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES

Barry v. Fowler, 902 F.2d 770 (9th Cir. 1990) 13

Beck v. Ohio, 379 U.S. 89 (1964) 20

Benigni v. Smith, 121 Fed. Appx. 164 (8th Cir. 2005) 13

Boykin v. Van Buren Twp., 479 F.3d 444 (6th Cir. 2007) 21, 22, 24, 25

Carroll v. U. S., 267 U.S. 132 (1925) 15

Christopher v. Nestlerode, 373 F. Supp. 2d 503 (M.D.Pa. 2005) 13

Colucci v. City of Aurora Police Dep't, 2007 U.S. Dist. LEXIS 90921 (N.D.Ohio) 28

Devenpeck v. Alford, 543 U.S. 146 (2004) 27, 28

Estate of Dietrich v. Burrows, 167 F.3d 1007 (6th Cir. 1999) 16

Fields v. City of South Houston, Texas, 922 F.2d 1183 (5th Cir. 1991) 13

Fisher v. Washington Metropolitan Area Transit Auth., 690 F.2d 1133 (4th Cir. 1982) 13

Gerstein v. Pugh, 420 U.S. 103 (1975) 15

Greene v. Reeves, 80 F.3d 1101 (6th Cir. 1996) 20

Hotaling v. LaPlante, 167 F. Supp. 2d 517 (N.D.N.Y. 2001) 13

Kentucky v. Graham, 473 U.S. 159 (1995) 10

TABLE OF AUTHORITIES – Continued

Page

Knight v. Jacobson, 300 F.3d 1272 (11th Cir. 2002) 13

Leonard v. Robinson, 477 F.3d 347 (6th Cir. 2007) 28

Lyons v. City of Xenia, 417 F.3d 565 (6th Cir. 2005) 20

Michigan v. DeFillippo, 443 U.S. 31 (1979) 15, 20

Painter v. Robertson, 185 F.3d 557 (6th Cir. 1999) 16

Peet v. City of Detroit, 502 F.3d 557 (6th Cir. 2007) 20

Radvansky v. City of Olmstead Falls, 496 F.3d 609 (6th Cir. 2007) 20, 26

Rothhaupt v. Maiden, 144 Fed. Appx. 465 (6th Cir. 2005) ..... *passim*

Schmidt v. City of Lockport, 67 F. Supp. 2d 938 (N.D.Ill. 1999) 13

Soltesz v. City of Sandusky, 49 Fed. Appx. 522 (6th Cir. 2002) 28

Street v. Surdyka, 492 F.2d 368 (4th Cir. 1974) 13

Tucker v. County of Jefferson, 110 F. Supp. 2d 117 (N.D.N.Y. 2000) 13

U. S. v. Green, 178 F.3d 1099 (10th Cir. 1999) 13

U. S. v. Smith, 73 F.3d 1414 (6th Cir. 1996) 13

U. S. v. Van Metre, 150 F.3d 339 (4th Cir. 1998) 13

TABLE OF AUTHORITIES – Continued

Page

Vargas-Badillo v. Diaz-Torres, 114 F.3d 3 (1st Cir. 1997) 13

Virginia v. Moore, ___ U.S. ___, 128 S. Ct. 1598 (2008) 13, 14, 15

Wilson v. Morgan, 477 F.3d 326 (6th Cir. 2007) 24

Woods v. City of Chicago, 234 F.3d 979 (7th Cir. 2000) 13

STATUTES

42 U.S.C. § 1983 9

K.R.S. § 431.005(1) 1, 11, 12, 15

CONSTITUTION

U.S. Const. amend. IV ..... *passim*

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Although the Petition attacks the lower courts' decisions regarding the relevancy of Kentucky Revised Statute § 431.005(1) to Petitioner's Fourth Amendment claim, the Petition did not set forth the provisions of that statute. It provides:

> (1) A peace officer may make an arrest:
>
> (a) In obedience to a warrant; or
>
> (b) Without a warrant when a felony is committed in his presence; or
>
> (c) Without a warrant when he has probable cause to believe that the person being arrested has committed a felony; or
>
> (d) Without a warrant when a misdemeanor, as defined in KRS 431.060, has been committed in his presence; or
>
> (e) Without a warrant when a violation of KRS 189.290, 189.393, 189.520, 189.580, 511.080, or 525.070 has been committed in his presence, except that a violation of KRS 189A.010 or KRS 281A.210 need not be committed in his presence in order to make an arrest without a warrant if the officer has probable cause to believe that the person has violated KRS 189A.010 or KRS 281A.210.

COUNTERSTATEMENT OF CASE[1]

As a hobby, Seldon and Phyllis Scott sell items on eBay, an internet website that hosts online auctions. In July 2001, the Scotts listed four Pfaltzgraff tumblers on eBay in a listing that contained a photograph and description indicating that one of the tumblers had a "manufacture flaw in the glaze on the rim." Petitioner, Jay Rothhaupt, who lives in Colorado Springs, submitted the winning bid of $59.00. (R. 109 Trial at TR 156-157, 171, JA 337-338, 347; R. 20 MSJ Exh. 1 and 2, JA 81-82)

After receiving the tumblers, Petitioner sent the Scotts an email message, claiming:

> . . . the four tumblers . . . have the following flaws:
>
> > Tumbler 1. Varying width of missing glaze (approx. 1/8" wide average) around approx. 80% of the bottom edge.
> >
> > Tumbler 2. Extensive, dark cracks in the glaze (aka crazing) over both the exterior and interior. Varying width of

---

[1] Petitioner's Statement of the Case relies exclusively on Petitioner's own deposition testimony. Such an approach is misplaced. Where, as here, the underlying case was resolved by jury trial, trial testimony – not deposition testimony – matters. Moreover, there is no obligation that the Court assume the facts most favorable to Petitioner. Therefore, a one-sided version of the facts, especially one the jury apparently did not credit, is inappropriate.

> missing glaze (approx. 1/8" wide average) around approx. 2/3 of the bottom edge.
>
> Tumbler 3. Two pits in the glaze on the interior and one pit on the top of the rim. Section of missing glaze approx. 1 mm x 2 mm on the edge of the rim. Varying width of missing glaze (approx. 1/8" wide average) around approx. 90% of the bottom edge. Glaze cracks over several square inches of the interior.
>
> Tumbler 4. Pit in the glaze on the top of the rim. Extensive glaze bumps approx. 1 mm diameter or less on the entire exterior (except for the pedestal). No glaze missing from the bottom edge.

(R. 20 MSJ Exh. 3, JA 83) The message asked the Scotts to "let me know your position regarding the obvious, undescribed flaws." (R. 20 MSJ Exh. 3, JA 83)

Through July 31, 2001, Petitioner and the Scotts exchanged email messages in an attempt to resolve the dispute. Initially, Mrs. Scott offered Petitioner a full refund without questioning his assertions about the defects. She explained, " . . . we do this as a hobby and we try to describe the items to the best of our ability and do not try to deceive anyone." (R. 20 MSJ Exh. 4, JA 84)

Petitioner was not satisfied with a refund. He wanted additional compensation:

> . . . a refund does not satisfy your contractual requirement for the subject auction . . . If a buyer were satisfied having the money instead of having the items described in the auction, the buyer wouldn't have bid on the auction. Please let me know if you have any alternatives – I'm optimistic this problem can be resolved.

(R. 20 MSJ Exh. 5, JA 85)

The following day, Mr. Scott sent Petitioner an email, again offering a full refund upon return of the tumblers. (R. 20 MSJ Exh. 6, JA 86) Petitioner responded, accused the Scotts of criminal fraud, and threatened to file an eBay "fraud report" against them. (R. 20 MSJ Exh. 7, JA 87)

On July 30, 2001, Mr. Scott offered Petitioner – for the third time – a full refund, offered to pay return shipping charges, and invited Petitioner to telephone Scott at Scott's expense to discuss the matter. He said the Scotts felt harassed by the tone and suggestions in Petitioner's communications, and that the Scotts had "done all that is possible" to address his dissatisfaction. (R. 20 MSJ Exh. 8, JA 88)

The next day, Petitioner accused the Scotts of lying:

> I'll start by identifying your falsehoods . . . clearly there are additional things you can do to resolve the problem you've caused via your fraud, so your claim that you 'have done all

> that is possible' is false. Perhaps you're confusing the set of things you're 'willing' to do with the set of things you 'can' do.

(R. 20 MSJ Exh. 9, JA 89) In addition, Petitioner advised the Scotts he intended to file a complaint with PayPal, the internet website that facilitated Petitioner's payment for the tumblers, and a fraud complaint with the U.S. Postal Service. (R. 20 MSJ Exh. 9, JA 89) Petitioner did not indicate whether he intended to return or keep the tumblers, and the Scotts heard nothing more from him until the day of the arrest that is the subject of this action.

In the meantime, Mr. Scott, who was a Special Deputy with the Carroll County Sheriff's Department and who serves as Carroll County Disaster Emergency Services Coordinator, had talked with his co-workers about his difficulties with Petitioner. In particular, Mr. Scott told Deputy Ron Dickow about his online transaction with Petitioner, that Petitioner was unhappy with the item, and that Petitioner was sending him annoying and alarming emails. (R. 109 Trial at TR 26, 42, 69-70, 171-173, JA 287, 290, 298-299, 347-349; R. 110 Trial at TR 3-6, JA 371-374)

In addition, because they were suspicious of Petitioner and unnerved by his accusations, the Scotts contacted other eBay users to determine if others had the same experience with Petitioner. Several responded, including a woman who "really didn't want to say anything bad about [Petitioner] because, "I am afraid of him"; someone who reported

receiving "threatening and nonproductive" messages from Petitioner; and, a woman who indicated Petitioner was becoming "more threatening, more bullying" with her. (R. 20, MSJ Exh. 10, JA 90-102)

At 4:15 p.m. on September 21, 2001[2] – ten days after "9-11" and nearly two months since the Scotts had last heard from Petitioner – Mrs. Scott answered her home telephone. The male caller did not identify himself, but said he had a package to deliver to 1712 Hilltop Drive, was "not far away," would be there "in just a few minutes," and asked whether anyone would be home. When Mrs. Scott asked for more information about the caller and the package, the caller said only that the package was from Colorado. Mrs. Scott was not expecting a delivery and did not make the connection between Colorado and Petitioner, so she told the caller to "hold on a minute" and turned to Mr. Scott to discuss the matter. The caller abruptly hung up. (R. 109 Trial at TR 76-77, 132-134, 159, 174, RA 300-301, 318-320, 340, 350)

A few minutes later, a strange man parked his car in front of the Scotts' house and approached the house carrying a box. The man told Mr. Scott, who was standing inside the house with the front door slightly ajar, that he had a delivery for 1712 Hilltop Drive. Without identifying himself, what was in the package, or where the package was from, the man

---

[2] The Petition contains the wrong date. The arrest occurred on September 21, 2001, not 2002. (Petition, p. 3)

demanded $100.00 – nearly twice what Petitioner had paid for the tumblers – in exchange for the package. Mr. Scott asked the man multiple times "who are you with," and eventually Petitioner identified himself. Mr. Scott told Petitioner to leave, but Petitioner did not. Only after Mr. Scott refused the package, told Mrs. Scott to call the police, and obtained Petitioner's license plate number, did Petitioner leave. (R. 109 Transcript, pp. 134-136, 139-141, 159-165, 174-176, JA 320-322, 323-325, 340-346, 350-352)

Deputy Dickow was dispatched to respond to Mrs. Scott's call, having been told by the dispatcher that "a subject" was refusing to leave the Scotts' property. While en route, Dickow heard radio transmissions indicating that the subject had left the property in a vehicle bearing Colorado license plates and that Mr. Scott was following the subject. Dickow caught up with them on Interstate 71, and pulled the subject – who turned out to be Petitioner – over. Mr. Scott pulled behind Dickow's cruiser. (R. 109 Trial at TR 175-176, JA 351-352; R. 110 Trial at TR 6-9, JA 374-377)

The parties disagreed about what happened at the scene of the arrest.

At trial, Dickow and Mr. Scott testified that Dickow spoke separately with Mr. Scott and Petitioner. (R. 109 Trial at TR 176, JA 352; R. 110 Trial at TR 9-13, JA 377-381) According to Dickow, Mr. Scott told him Mrs. Scott had received a telephone call from a man who refused to identify himself, wanted

to know whether anyone would be home, and hung up. Mr. Scott told Dickow that Petitioner showed up at the Scotts' house a few minutes after the telephone call, that Petitioner refused to leave when told multiple times to do so, and that Petitioner had demanded significantly more money than the purchase price of the tumblers. Dickow also testified that Mr. Scott mentioned an email he sent to Petitioner, expressly telling Petitioner he wanted no further communications or contact with him. (R. 110 Trial at TR 11, 27, JA 379, 384)

Dickow also testified at trial about his discussion with Petitioner at the scene. He testified at trial that he saw a rifle case in the back seat of the car, causing him concern about Petitioner's intentions. Dickow asked Rothhaupt whether he had been at the Scotts' home. Petitioner admitted he had, but characterized his purpose as trying to return a package "COD" at the Scotts' invitation. (R. 110 Trial at TR 10-11, 14, 26, JA 378-379, 382-383)

Mr. Scott's trial testimony was essentially consistent with Dickow's. Of particular note, Mr. Scott testified he told Dickow about the email he had sent Petitioner after Petitioner rejected his third offer of a full refund. In that email, Mr. Scott told Petitioner not to contact the Scotts again. (R. 109 Trial at 176-180, JA 352-356)

On the other hand, Petitioner's trial testimony was markedly different from Dickow's and Scott's. He testified that Dickow and Mr. Scott approached his

vehicle together and that Mr. Scott participated in questioning him. Petitioner testified he told Dickow that Mr. Scott had given him permission to come onto the property, and that Mr. Scott did not tell Petitioner to leave, but rather, told him to stay. Further, Petitioner testified that Dickow could not possibly have seen the rifle in his car because he had intentionally obscured the rifle from the view of others. (R. 109 Trial at TR 82-87, 141-152, JA 302-307, 325-336)

In any event, Petitioner was arrested and charged with stalking in the second degree, harassing communications, theft by deception, and criminal trespass in the third degree. (R. 109 Trial at TR 60-61, JA 295-296) Petitioner was not convicted of any of these charges.

PROCEEDINGS BELOW

On September 20, 2002, Petitioner filed a civil action pursuant to 42 U.S.C. § 1983, alleging violations of his rights under the Second, Fourth, Fifth and Fourteenth Amendments, as well as assorted state-law torts. (R. 1 Complaint, JA 7-28) The Eastern District of Kentucky exercised jurisdiction over the matter pursuant to 28 U.S.C. §§ 1331 and 1367.

The District Court granted summary judgment to Defendants, Carroll County,[3] Sheriff Charlie Maiden, Deputy Sheriff Ron Dickow, Seldon Scott and Phyllis Scott on all federal claims, and declined to exercise supplemental jurisdiction over the state-law claims. (R. 45 Judgment, JA 209-211) Petitioner appealed the dismissal of his federal claims to the Sixth Circuit on July 20, 2004. (R. 46 Notice of Appeal, JA 212-213) In *Rothhaupt I*,[4] the Sixth Circuit reversed and remanded on one issue – the Fourth Amendment false arrest claim against Dickow – but otherwise affirmed the District Court's decision. (R. 50 Judgment, JA 214-231)

Petitioner filed a Petition for Writ of Certiorari to this Court, which was ultimately denied. (R. 59 Agreed Order, JA 232-233) Thereafter, the sole remaining issue – whether or not Dickow had probable cause to arrest Petitioner – was tried, and the jury returned a verdict in Dickow's favor. (R. 102 Judgment, JA 265) The jury found that Dickow had probable cause to arrest Petitioner for trespassing,

---

[3] Although Carroll County was not identified in the Complaint caption as a defendant, Carroll County was a defendant by virtue of the claims against Maiden, Dickow and Scott in their official capacities. *Kentucky v. Graham*, 473 U.S. 159 (1995).

[4] That appeal was styled *Rothhaupt v. Charlie Maiden et al.*, Sixth Circuit Case No. 04-5868. The resulting decision is reported as *Rothhaupt v. Maiden*, 144 Fed. Appx. 465 (6th Cir. 2005).

stalking and harassing communications. (R. 101 Jury Verdict, JA 262-264)

Dissatisfied, Petitioner appealed the jury's verdict to the Sixth Circuit. He argued that the District Court erred in excluding references at trial to Kentucky Revised Statute § 431.005, which provides – with a few exceptions not relevant here – that police officers in Kentucky may only arrest for misdemeanors when those misdemeanors are committed in their presence. In addition, Petitioner argued that the District Court erred in instructing the jury regarding probable cause. In that respect, Petitioner contended the District Court should not have informed the jury that, "Once an officer establishes probable cause, he is under no obligation to continue investigating and may instead pursue the arrest of a suspect." He also contended the instruction should have included the following language from the Sixth Circuit's decision in *Rothhaupt I*:

> A mere allegation of criminal behavior, while possibly justifying a brief investigatory detention, is insufficient by itself to establish that a crime has been committed. To establish probable cause in the face of such a naked allegation, an officer must investigate further and find objective factors to corroborate the claim.

(Appellant's Brief, pp. 12-13, 15)

In a sound and well-reasoned opinion, the Sixth Circuit affirmed the District Court's exclusion of

K.R.S. § 431.005(1), concluding that it was not relevant because a federal constitutional claim cannot be premised on a violation of state law. (Petitioner's Appendix 8a-10a) The Sixth Circuit also affirmed the jury instructions as having fairly and "adequately informed the jury of the relevant considerations and provided a basis in law for aiding the jury in its decision." (Petitioner's Appendix 6a-7a)

The instant Petition – Petitioner's second before this Court on these facts – followed.

REASONS FOR DENYING THE PETITION

I. THE EXCLUSION OF K.R.S. § 431.005(1) DOES NOT PROVIDE A COMPELLING REASON TO JUSTIFY THE EXERCISE OF CERTIORARI IN THIS CASE.

With a few exceptions not relevant under the facts of this case, Kentucky has a statute requiring that police officers cite, rather than arrest, misdemeanor offenders for crimes not committed in the arresting officer's presence. K.R.S. § 431.005(1). Respondent, Carroll County Deputy Sheriff Ron Dickow, believed Petitioner had committed a misdemeanor offense, based on information Dickow received about events that occurred outside of Dickow's presence. Instead of citing Petitioner, Deputy Dickow arrested him. Petitioner contends the District Court should have instructed the jury regarding the state-specific arrest statute before the jury decided the

pivotal issue in Petitioner's Fourth Amendment claim against Deputy Dickow, i.e. whether Deputy Dickow had probable cause to believe that Petitioner had committed any of the offenses.

Whether the analysis of a Fourth Amendment claim is affected by a state-specific arrest statute is an issue federal courts have squarely addressed time and again. *See, Virginia v. Moore*, ___ U.S. ___, 128 S. Ct. 1598 (2008); *Vargas-Badillo v. Diaz-Torres*, 114 F.3d 3 (1st Cir. 1997); *Street v. Surdyka*, 492 F.2d 368 (4th Cir. 1974); *U. S. v. Van Metre*, 150 F.3d 339 (4th Cir. 1998); *Fisher v. Washington Metropolitan Area Transit Auth.*, 690 F.2d 1133 (4th Cir. 1982); *Fields v. City of South Houston, Texas*, 922 F.2d 1183 (5th Cir. 1991); *U. S. v. Smith*, 73 F.3d 1414 (6th Cir. 1996); *Woods v. City of Chicago*, 234 F.3d 979, 991-994 (7th Cir. 2000); *Benigni v. Smith*, 121 Fed. Appx. 164 (8th Cir. 2005); *Barry v. Fowler*, 902 F.2d 770 (9th Cir. 1990); *U. S. v. Green*, 178 F.3d 1099 (10th Cir. 1999); *Knight v. Jacobson*, 300 F.3d 1272 (11th Cir. 2002); *Hotaling v. LaPlante*, 167 F. Supp. 2d 517 (N.D.N.Y. 2001); *Tucker v. County of Jefferson*, 110 F. Supp. 2d 117 (N.D.N.Y. 2000); *Christopher v. Nestlerode*, 373 F. Supp. 2d 503 (M.D.Pa. 2005); *Schmidt v. City of Lockport*, 67 F. Supp. 2d 938 (N.D.Ill. 1999). These courts have consistently concluded that the contours of the Fourth Amendment are not defined with reference to the requirements of state law - in other words, that an arrest complies with the Fourth Amendment if there is probable cause to support it, notwithstanding any state-specific statute placing

additional restrictions on a police officer's arrest authority.

Had there been any doubt whatsoever on that issue over the years, this Court laid that doubt to rest just six months ago. Specifically, in *Moore*, *supra*, a police officer suspected that a driver was operating a vehicle on a suspended license, and affected a traffic stop. Having confirmed that the driver's license was indeed suspended, the officer arrested the driver for that offense – a misdemeanor – even though a state statute in Virginia dictated that an officer could not arrest a misdemeanant. Following the arrest, the police officer searched the driver, found he was in possession of crack cocaine, and charged him with a drug crime. At his criminal trial, the driver argued that the Fourth Amendment required suppression of the drug evidence because the evidence was secured following an unlawful arrest. On those facts, this Court refused to accept the premise on which the driver's suppression argument was based, i.e. that his arrest was unlawful under the Fourth Amendment. The Court ruled that an arrest is lawful under the Fourth Amendment so long as it is supported by probable cause, notwithstanding any state-specific limitation on the circumstances under which an officer may arrest as opposed to issuing a citation. This Court noted that individual states are free to place limitations on an officer's discretion to arrest, but that any such limitations imposed by the state do not affect the Fourth Amendment inquiry. *Id.* at 1605-1607.

The implications of *Moore* on the issue presented by this Case are obvious. Since state-imposed limitations on an officer's discretion to arrest do not affect the Fourth Amendment inquiry, K.R.S. § 431.005(1), which generally provides that a police officer may not arrest for a misdemeanor committed outside of his presence, has no bearing on the validity of Petitioner's arrest under the Fourth Amendment. As such, the District Court correctly refused to instruct the jury regarding the provisions of K.R.S. § 431.005(1).

In light of this Court's very recent pronouncement on the issue, there is no compelling reason to consider the issue yet again.

Petitioner's contention that the lower courts' opinions in this case somehow conflict with this Court's holdings and with the decisions in other Circuits (Petition, p. i) is nothing more than a contrived attempt to address Rule 10's "compelling reasons" standard. That contention fails to account for this Court's decision in *Moore*, relying instead on *Michigan v. DeFillippo*, 443 U.S. 31 (1979), *Gerstein v. Pugh*, 420 U.S. 103 (1975), and *Carroll v. U. S.*, 267 U.S. 132 (1925), which discuss the probable cause standard in contexts far removed from the instant case. Neither *DeFillippo*, *Pugh* nor *Carroll* addresses the specific issue presented in this case, i.e. whether a state-specific law governing arrest procedure is relevant to the Fourth Amendment's probable cause inquiry. (Petition, pp. 9-13) Consequently, Petitioner has not supported his contention that the Sixth

Circuit and District Court opinions in the present case conflict with this Court's holdings.

Nor does the Petition cite a single case from any Circuit other than the Sixth that would substantiate the claimed existence of a conflict among the lower federal courts. (Petition, pp. 9-13) Consequently, Petitioner has not supported his contention that the Circuit Courts are split on this issue.

Not even the two Sixth Circuit cases cited in the Petition demonstrate a compelling reason to exercise certiorari in this case. The plaintiffs in those cases – *Estate of Dietrich v. Burrows*, 167 F.3d 1007 (6th Cir. 1999), and *Painter v. Robertson*, 185 F.3d 557 (6th Cir. 1999) – were arrested and charged with violations of Ohio Revised Code § 2923.12. Because O.R.C. § 2923.12 set forth the *substantive elements* of the offense with which those plaintiffs were charged, it was clearly relevant to the issue of probable cause. A jury cannot determine "whether the facts and circumstances within an officer's knowledge are sufficient to warrant a prudent person . . . in believing that the suspect has committed . . . an offense" without knowing what the substantive elements of the offense are. *DeFillippo, supra.* As a result, the courts in *Burrows* and *Painter* properly considered O.R.C. § 2923.12, just as the District Court properly instructed the jury regarding the substantive provisions of the state law offenses with which Petitioner was charged. *Burrows* and *Painter* certainly demonstrate that state law is relevant to the Fourth Amendment inquiry to the extent that state law defines the substantive elements

of the offense on which an arrest is premised. They do not, however, support the proposition for which Petitioner relies on them, i.e. that state-specific statutes relating to arrest *procedures* are relevant in determining whether a particular arrest violates the Fourth Amendment.

There being a recent case on point from this Court, and there being no conflict among the lower federal courts on the issue, there is no compelling reason to justify the exercise of certiorari.

II. PETITIONER'S ARGUMENTS RELATING TO THE JURY INSTRUCTIONS USED AT THE TRIAL OF HIS FOURTH AMENDMENT CLAIM DO NOT PRESENT A COMPELLING REASON TO JUSTIFY THE EXERCISE OF CERTIORARI.

Petitioner also contends that this case should be reversed because the jury instructions were allegedly improper. He does not, however, suggest that the jury instructions given by the District Court and affirmed by the Sixth Circuit in this case raise any "important matter" of law within the meaning of Rule 10. Nor does he argue that the Sixth Circuit's decision regarding the jury instructions conflicts with a decision of this Court or of another Circuit. Simply put, even Petitioner does not contend that there is a "compelling reason" to justify the exercise of certiorari to review the jury instructions. Rather, he merely posits that the jury instructions did not conform to the facts

and that they were prejudicial to him. (Petition, pp. 13-17)

The lower courts' decisions regarding the jury instructions in this case were entirely consistent with applicable law.

A. THE JURY INSTRUCTION FAIRLY AND ADEQUATELY SUBMITTED THE ISSUES AND APPLICABLE LAW TO THE JURY.

At the conclusion of evidence, the District Court instructed the jury on probable cause:

> Now, let me explain what the term "probable cause" means.
>
> There was probable cause for the arrest if, at the moment the arrest was made, the facts and circumstances within Officer Dickow's knowledge and of which he had reasonable trustworthy information were sufficient to warrant a prudent man in believing that the plaintiff, Jay Rothhaupt, had committed one of the crimes for which he was arrested.
>
> Officer Dickow arrested the plaintiff on four charges: trespassing in the third degree, stalking in the second degree, harassing communications, and theft by deception. It's not necessary that defendant Ron Dickow had probable cause to arrest the plaintiff for all of the crimes with which he was charged,

so long as he had probable cause to arrest Rothhaupt for one of those crimes.

Probable cause requires more than just suspicion, but it does not need to be based on evidence that would be sufficient to support a conviction or even a showing that the defendant's belief was probably right. Once an officer establishes probable cause, he is under no obligation to continue investigating and may instead pursue the arrest of a suspect. [. . . coughing . . .]

Now, for your information in considering whether there was probable cause to believe that Rothhaupt committed the crimes with which he was charged, those crimes are defined as follows in the Kentucky statutes.

[The Court then read the Kentucky statutes defining the four crimes with which Petitioner was charged.]

(R. 111 Jury Instructions at TR 11-15, JA 412-417)

The propriety of jury instructions are measured by the following standard:

> We review a properly preserved objection to a jury instruction by determining whether the charge, taken as a whole, fairly and adequately submits the issues and applicable law to the jury. . . . We will reverse a judgment where the jury instruction fails accurately to reflect the law. In addition, we may reverse the trial court based on a faulty charge only if the instructions, viewed as a

> whole, were confusing, misleading, or prejudicial.

Radvansky v. City of Olmstead Falls, 496 F.3d 609, 617 (6th Cir. 2007) (internal citations omitted).

Taken as a whole, the instruction fairly and adequately reflected the law, such that the jury could make an informed decision regarding probable cause. The instruction informed the jury, consistent with well-established federal law, that: (1) an arrest is supported by probable cause if, at the moment the arrest was made, the facts and circumstances within the officer's knowledge and of which he had reasonably trustworthy information, were sufficient to warrant a prudent man in believing that the plaintiff had committed one of the crimes for which he was arrested, e.g., *DeFillippo*, *supra*; *Beck v. Ohio*, 379 U.S. 89 (1964); *Peet v. City of Detroit*, 502 F.3d 557 (6th Cir. 2007); (2) where an officer arrests a person and charges him with multiple crimes, the arrest is valid if probable cause exists for at least one of the charges, e.g., *Lyons v. City of Xenia*, 417 F.3d 565 (6th Cir. 2005); and, (3) probable cause requires more than just suspicion, but it does not need to be based on evidence that would be sufficient to support a conviction, e.g., *Greene v. Reeves*, 80 F.3d 1101, 1105 (6th Cir. 1996).

In criticizing the instruction, Petitioner's argument fails to observe the applicable standard. He does not consider the subject instruction *as a whole*. Instead, he isolates one specific sentence and argues

that it renders the entire instruction invalid, notwithstanding the rest of the instruction. Specifically, he contends the instructions should not have informed the jury that, "Once an officer establishes probable cause, he is under no obligation to continue investigating and may instead pursue the arrest of a suspect." (Petition, p. 15) He also argues that the instruction should have included the following language from the Court's decision in *Rothhaupt I*:

> A mere allegation of criminal behavior, while possibly justifying a brief investigatory detention, is insufficient by itself to establish that a crime has been committed. To establish probable cause in the face of such a naked allegation, an officer must investigate further and find objective factors to corroborate the claim.

(Petitioner's Sixth Circuit Brief, pp. 12-13, 15; Petition, p. 16) Notwithstanding the inclusion of the former language and the absence of the latter, the instruction as given accurately reflected the law and was not confusing, misleading or prejudicial.

Consistent with the District Court's instruction, the law is clear that once an officer develops probable cause, he is under no obligation to investigate further. E.g., *Boykin v. Van Buren Twp.*, 479 F.3d 444 (6th Cir. 2007). Because the instruction is an accurate reflection of the law, Petitioner's complaint about the inclusion of that sentence is unfounded. In arguing otherwise to the Sixth Circuit, Petitioner attempted to distinguish *Boykin* by artificially categorizing false

arrest cases as involving either "grudge arrests" (his term) or non-"grudge arrests." He acknowledged that the *Boykin* language applies in the absence of a "grudge arrest." However, he claimed that language is inappropriate in "grudge arrest" cases, advocating instead that an officer is always required to investigate further in such cases. (Petitioner's Sixth Circuit Brief, pp. 13-14; R. 109 Trial at TR 198-199, JA 364-365)

Because the obvious flaws in that theory were exposed before the Sixth Circuit, Petitioner has been careful to avoid references to the "grudge arrest" in his Petition. Instead, he now defines *Boykin* as applicable to cases where the information within an officer's knowledge is not "perfectly credible." (Petition, p. 16) On the strength of the Sixth Circuit's decision in *Rothhaupt I*, Petitioner insinuates that the information within Deputy Dickow's knowledge was not "perfectly credible," and that the jury instruction therefore should not have included *Boykin* language. (Petition, p. 16)[5] Notwithstanding the clever recrafting of his argument, Petitioner cannot escape the flaw in his argument.

First, Petitioner's insinuation neglects the context in which *Rothhaupt I* was decided and the procedural standard that applies in that context. In

---

[5] When Petitioner refers to the Sixth Circuit's opinion on p. 16 of his Petition, he is referring to the Sixth Circuit's opinion in *Rothhaupt I*.

Rothhaupt I, this Court's mission was to decide whether the evidence, as presented by the summary judgment briefs and taken in a light most favorable to Petitioner, compelled a finding that Dickow had probable cause to arrest Petitioner. With respect to "the 'who,' 'what,' 'why,' and 'how' the information came to Dickow," the Court assumed a set of facts most favorable to Petitioner, and drew all inferences – including those of credibility – in his favor. Ultimately, in *Rothhaupt I*, the Court ruled the facts and inferences it was required to assume did not compel a finding that Dickow had probable cause to make the arrest as a matter of law.

Of pivotal import, *Rothhaupt I* did not conclusively establish the facts of this case, nor did it affirmatively decide that Dickow lacked probable cause, as Petitioner suggested to the Sixth Circuit in *Rothhaupt II* and as he continues to suggest in his Petition. (Petitioner's Sixth Circuit Brief, pp. 12-15; Petition, p. 16) For example, Petitioner describes *Rothhaupt I* as having conclusively "found that the information relied upon by Dickow was unreliable under the facts within and therefore Dickow would be required to do a further investigation in order to establish probable cause." (Petitioner's Sixth Circuit Brief, p. 14; Petition, p. 16) That simply is not true. Considering the Sixth Circuit's mission in *Rothhaupt I* – and the fact that it did not remand with instructions to grant summary judgment in *Petitioner's* favor on the issue of probable cause – that case can only be construed as having ruled that a jury *could* find that

probable cause did not exist. Indeed, that is explicitly what *Rothhaupt I* says.[6] In order for a jury to find probable cause lacking, however, it would have to believe that Mr. Scott was completely unreliable and would have to credit Petitioner's testimony to the exclusion of everyone else's. Of course, while the Court in *Rothhaupt I* was required to so believe, the jury that ultimately heard the evidence and decided this case in *Rothhaupt II* was not. *See Wilson v. Morgan*, 477 F.3d 326 (6th Cir. 2007) (Sixth Circuit's decision affirming denial of summary judgment based on apparent lack of probable cause in prior appeal did not preclude magistrate from revisiting that issue on remand after presentation of evidence at trial).

Petitioner's delineation of when *Boykin* language applies and when it does not also suffers from a second basic flaw. Specifically, Petitioner's theory requires *courts* to determine whether or not the facts in a given case demonstrate that the information within the arresting officer's knowledge at the time of arrest is "perfectly credible." Of course, that usurps the role of the jury. Where the facts are in dispute, which is the case in *every* jury trial, it is the province of the jury, not the court, to determine whether and to what degree the arresting officer's sources are reliable. A jury is not required to accept a plaintiff's assertion that a particular informant is unreliable because of some motive, contrived by the plaintiff in

---

[6] *Rothhaupt I, supra* at 470.

hindsight, to falsely accuse him. But Petitioner's contention with respect to the jury instructions requires a court to *accept* a plaintiff's assertions in that regard and, in effect, to *tell* the jury that a given arrest constitutes a "grudge arrest" and that the informant was unreliable because of whatever contrived motive the plaintiff can conjure up.

Moreover, Petitioner's theory carries other problems. Unless the trial judge could accurately predict how the jury perceived the facts, he would have a 50-50 chance of charging the jury correctly. And, if a court were always required to instruct the jury that an officer had a duty to "investigate further" merely because a civil rights plaintiff alleges the existence of a grudge, a plaintiff could effectively elevate the probable cause standard merely by insinuating that the informant had a grudge against him – whether or not there is factual support for that insinuation.

Of course, a logical corollary to the *Boykin* language is that a police officer must investigate until he establishes probable cause. Thus, the jury *was* apprised that an officer cannot always accept a "naked allegation," which was the general point of the language Petitioner complains was omitted from the instruction.

In addition to instructing the jury that an officer is not required to investigate further once probable cause has been established, the District Court gave the jury parameters for evaluating when probable cause has been established. Among other parameters,

the District Court instructed the jury, consistent with *Radvansky*, *supra*, and other authorities, that an officer must consider all the facts and circumstances known to him at the time, as well as the extent to which the information provided to him is reasonably trustworthy. (R. 111 Jury Instructions at TR 11-15, JA 248-253) That instruction was certainly sufficient to inform the jury that it had to consider whether, and if so, to what degree, the dispute between the Scotts and Petitioner affected Mr. Scott's reliability. Likewise, that instruction was sufficient to inform the jury that it had to consider whether it was reasonable for Dickow to be skeptical of Petitioner's claim that he had "permission" to be on the Scotts' property. Those are the considerations underlying the language Petitioner proposed for inclusion in the instruction, which the District Court properly rejected.

The precise jury instruction language Petitioner proposed was problematic because, according to *Rothhaupt I*, it represents the standard applicable when the source of an allegation is not reliable. That finding is within the province of the jury, not the court. Had the District Court included Petitioner's proposed language in the instruction, it would have essentially determined that – rather than letting the jury consider whether – the information Dickow received from Scott was unreliable.

Simply put, Petitioner's criticism of the probable cause instruction is unfounded. The instruction accurately reflects the law, and is not confusing, prejudicial or misleading.

B. THE JURY INSTRUCTION CONFORMED TO THE FACTS.

Petitioner also argues that the District Court erred in instructing the jury to consider whether Dickow had probable cause to arrest him for stalking and theft by deception, couching that argument as whether the instructions conformed to the facts. (Petition, pp. 13-14) That argument is based on the fact that Dickow initially told Petitioner he was being arrested for trespassing and harassing communications, but amended the citation to include charges of stalking and theft by deception once Dickow arrived at the Carroll County Detention Center with Petitioner. (Petition, pp. 13-14; R. 109 Trial at TR 60-62, JA 295-297) In other words, Petitioner contends that probable cause cannot be founded on charges that were not recited to the arrestee at the moment of his arrest. (R. 110 Trial at TR 34-36, JA 387-389)

The Supreme Court put this contention to rest in *Devenpeck v. Alford*, 543 U.S. 146 (2004). There, the plaintiff was arrested, but the charge against him was dismissed because a state appellate court had recently ruled that the type of conduct the plaintiff engaged in did not violate the statute he was charged under. He filed a civil rights suit against the arresting officer. The officer defended on the basis that the facts known to him at the time of the arrest provided probable cause to believe the plaintiff had committed a different crime, one that the plaintiff had never been charged with. The Supreme Court ruled that the officer could mount a defense on that basis. The Court

explained that an arrest is lawful so long as the facts within the officer's knowledge at the time of the arrest provide probable cause to believe the suspect committed *some* crime, not necessarily the crime the officer subjectively identified at the time of the arrest. *Id.* at 153; *see also Leonard v. Robinson*, 477 F.3d 347, 353 (6th Cir. 2007); *Soltesz v. City of Sandusky*, 49 Fed. Appx. 522 (6th Cir. 2002); *Colucci v. City of Aurora Police Dep't*, 2007 U.S. Dist. LEXIS 90921 (N.D.Ohio).

In light of this authority, Petitioner's arrest was lawful if, based on Dickow's knowledge at the time of the arrest, there was probable cause to believe Petitioner had committed stalking or theft by deception – even if he was not immediately charged with those crimes. As such, it was not error for the District Court to instruct the jury on those charges.

CONCLUSION

Petitioner presents no compelling reason for the exercise of certiorari, and his Petition for Writ of Certiorari must therefore be denied.

Respectfully submitted,

JEFFREY C. MANDO*
JENNIFER H. LANGEN
ADAMS, STEPNER, WOLTERMANN,
DUSING, P.L.L.C.
40 West Pike Street
P.O. Box 861
Covington, Kentucky 41012
(859) 394-6200
Fax: (859) 392-7263

Counsel of Record